Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BRIAN SHEPPARD,
Petitioner,

v.

LEON BEERMAN,
as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In ruling that law clerks as a class do not have a reasonable expectation of privacy in their private offices and their desks and file cabinets therein, did the Second Circuit properly apply the case-by-case approach espoused by a plurality of this Court in *O'Connor v. Ortega*, 480 U.S. 709 (1987)?

2. Is the seizure of a government employee's private belongings upon his or her retaliatory discharge reasonable if the purpose of the seizure is to suppress evidence of the employer's misconduct that led to the discharge and if the seizure continues over a period of days?

3. If a law clerk is discharged for objecting to the misconduct of the judge for whom he or she works, does the Fourth Amendment impose any restrictions on the judge's examination of the clerk's private papers found during a search of the clerk's workplace after the discharge?

4. Is a court employee seized within the meaning of the Fourth Amendment when he or she is forcibly removed from the courthouse and prevented from reentering it?

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II. The decision below both presents this Court with an issue expressly left open in *Ortega*--the appropriate standard for determining the propriety under the Fourth Amendment of a seizure of personal belongings in the workplace--and directly conflicts with the holding in *Ortega* that a workplace search or seizure violates that Amendment if it is effected for an illegitimate purpose. 26

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M.L. Henry Jr., *In Defense of Appointed Judges*, N.Y.L.J., Feb. 29, 1988, at 2 . 25

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N.R. Kleinfield, *Admitting Guilt, Wachtler Offers Account of Plot*, N.Y. Times, April 1, 1993, at A1 26

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IN THE

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BRIAN SHEPPARD,

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LEON BEERMAN,
as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Brian Sheppard respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on March 3, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 18 F.3d 147, and is reproduced in

the Appendix hereto. (1a.)[1]

The memorandum decision of the United States District Court for the Eastern District of New York (Glasser, D.J.) is reported at 822 F. Supp. 931, and is reproduced in the Appendix. (23a.)

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1994. No petition for rehearing was sought. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched,

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[1]All of the appendix material for this Petition appears in one separately bound volume. Pagination in the Appendix includes the suffix "a."

and the persons or things to be seized.

STATEMENT OF THE CASE

A. *Procedural History*

Petitioner, a 1979 graduate of Stanford Law School, embarked on a career in the New York State judicial trial system after having spent seven years as an appellate practitioner. In 1986, Respondent, a justice of the New York State Supreme Court, sitting in Queens County in New York City, hired Petitioner as his law clerk.[2] However, in 1990, when Petitioner objected in chambers to Respondent's pattern of judicial misconduct, Respondent fired him; ejected him from the courthouse; searched and seized his belongings; and took the public position that he was

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[2]Justices of that court are elected to sit as trial judges for one or more 14-year terms. Each justice is entitled to select one law clerk and one secretary. Both often work for the justice for much or all of the justice's tenure. The law clerks frequently ascend to the judiciary themselves before that tenure expires.

discharged for cursing and losing control of himself.

In 1991, Petitioner instituted this action for damages and declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.[3] The Complaint, which is reproduced in the Appendix (67a), alleged, inter alia, that Respondent's conduct deprived him of his Fourth Amendment right to be free from unreasonable searches and seizures and his First Amendment right to freedom of speech.

Respondent filed a timely Answer, and his motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) (hereinafter 12(c))--claiming that the Complaint failed to state a cause of action--was deemed submitted in April of 1992. The District Court granted the motion in its entirety in May of 1993. In

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[3]Jurisdiction in the District Court was also predicated on 28 U.S.C. §§ 1331 (federal question), 1343 (equitable relief), 1367 (supplemental or pendent), and 2201-2202 (declaratory relief).

March of 1994, the Court of Appeals vacated the portion of the judgment which dismissed Petitioner's free speech claim, and affirmed the remainder of the judgment.

B. *The Searches and Seizures of Petitioner's Workplace, Property, and Body*

On December 7, 1990, the parties engaged in a heated dispute in chambers concerning Respondent's intermittent, but nevertheless egregious, official misconduct, such as engaging in improper ex parte communications with prosecutors; ordering Petitioner to draft decisions on motions in the prosecution's favor--regardless of their merits; and arranging to have a case assigned to Respondent so that he could exact personal revenge against the accused. Respondent denied having acted improperly until Petitioner indicated that he had taken notes of the activities in question.

Before Petitioner's next day at work

on December 11, Respondent fruitlessly searched Petitioner's private office in chambers in the hope of finding the notes. After Petitioner had been working in chambers for two hours on the 11th, court officers entered chambers, advised him that Respondent had just discharged him, and forced him to accompany them out of the courthouse, without being given an opportunity to gather his belongings. His reentry into the courthouse was forcibly barred for an indefinite period.

After the ejection, Respondent conducted another search of Petitioner's office, including the desk, file cabinets, and personal effects therein. A box of Petitioner's personal file cards was seized, removed into Respondent's private office, and examined. When Petitioner was permitted to gather his belongings in the company of court officers two days after his termination, he managed to obtain the

box of cards only after discovering and protesting its removal. However, he was prevented at that time from taking with him personal files from the file cabinet in his office, and was permitted to take those files several days later only after Respondent had an opportunity to inspect them.

Respondent took the public position that Petitioner was discharged for cursing and losing control of himself. As a result of the discharge, Respondent's public stance about it, and Petitioner's public ejection from the courthouse, Petitioner was unemployed for the first eighteen months after his termination, and, after an additional two years, has still be unable to obtain employment as a law clerk or a practicing attorney.[4]

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[4]Petitioner repeatedly advised the District Court of his dire economic circumstances since his discharge by Petitioner. Nevertheless, contrary to official guidelines, *see* 28 U.S.C. § 476, 481;

C. *Decisions Below*

1. *Free speech claim*

Despite Petitioner's position on the 12(c) motion that the court had to accept the allegations in the Complaint (67a-68a, ¶ 1; 73a-75a, ¶¶ 18, 20, 22) that he was discharged because of his speech, the District Court held that the Complaint failed to state a free speech claim because he was discharged for insubordination, and because the speech in question did not relate to a matter of public concern. (29a-45a.) In reaching its conclusion, the court emphasized the "intensely personal and confidential" nature of the judge/clerk relationship. (32a.)

E.D.N.Y. Civ. Just. Expense & Delay Reduction Plan § I.F.2, and to the District Court's own track record in other cases, *see* Pet. Mandamus at 32-34, *In re Sheppard*, No. 93-3030 (2d Cir. Apr. 27, 1993) (order denying mandamus relief), that court did not decide Respondent's 12(c) Motion for 13 months, and ultimately did decide it only after Petitioner obtained an order from the Court of Appeals denying a mandamus application "without prejudice to renewal in 30 days," *In re Sheppard*.

The Court of Appeals vacated this portion of the District Court's judgment, agreeing with Petitioner's argument that the court had made "improper factual findings" that he was "actually discharged for insubordination and not for his speech," since the motive behind the termination "is clearly a question of fact." (3a, 10a, 12a.) In this Petition, Petitioner does not challenge this favorable ruling of the Court of Appeals.[5]

2. *The Searches of Petitioner's Workplace*

Petitioner argued to both courts below that under the case-by-case approach endorsed by the plurality opinion in

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[5]Nor is the propriety of the unfavorable First Amendment rulings of the courts below--regarding the rights to obtain access to criminal proceedings and to petition the government for redress of grievances--raised in this Petition, except to the extent that those rulings relate to the Fourth Amendment issues raised in the Petition. *See infra* part IV., pp. 41-42 note 26; *see also* Robert Stern, Eugene Gressman & Steven Shapiro, *Supreme Court Practice* § 6.25, at 360-61 (6th ed. 1986).

O'Connor v. Ortega, 480 U.S. 709, 718-19 (1987), the Complaint (77a-78a, ¶ 29) clearly set forth a reasonable expectation of privacy on Petitioner's part on the basis of the custom and policy of Respondent and other New York judges. In putatively engaging in the case-by-case approach endorsed in that opinion, those courts made no mention of the allegations in the Complaint about the circumstances of Petitioner's expectation of privacy.

Instead, the District Court, harkening back to its ruling on the free speech claim, *see supra* part C.1., p. 8, held that the judge/law clerk relationship is "sui generis," and thus that law clerks who work for judges in "large metropolitan areas," where the chambers are "virtually inundated" with documents, have "no reasonable expectation of privacy in chambers' appurtenances, embracing desks, file cabinets or other work areas." (49a-

52a.) The Court of Appeals, without limiting its analysis to law clerks in large metropolitan areas, endorsed the position taken by that court:

> The working relationship between a judge and her law clerk, as noted by the district court, is unique. Unlike a typical employment relationship where an employer may limit the information she wants to share with her employees, in order for a judicial chambers to function efficiently, an absolute free flow of information between the clerk and the judge is usually necessary. Accordingly, the clerk has access to all the documents pertaining to a case. More importantly, clerks regularly have access to the judge's confidential thoughts on a case. The judge may discuss her feelings with her clerk, or may allow the clerk access to her personal notes. In turn, the judge necessarily has access to the files and papers kept by the clerk, which will often include the clerk's notes from discussions with the judge. Because of this distinctive open access to documents characteristic of judicial chambers, we agree with the district court's determination that Sheppard had "no reasonable expectation of privacy in chambers' appurtenances, embracing desks, file cabinets or other work areas."

(16a-17a.)

3. *The Seizure of Petitioner's Property*

Petitioner argued to both courts below that in ruling on Respondent's 12(c) motion, those courts had to accept the allegations in the Complaint (73a-74a, ¶¶ 18-19; 76a-77a, ¶¶ 24-27) that Respondent seized Petitioner's property upon and after ejecting him from the courthouse, not for any legitimate work-related reason, but to locate and suppress notes Petitioner had taken about Respondent's misconduct. However, both courts held that the seizure and retention of the property over the course of days was reasonable in purpose, scope, and duration because *Respondent* was *legitimately* attempting to ensure that *Petitioner* did not *retaliate* against *Respondent* by removing or destroying court files or other court property. (17a-19a [2d Cir.'s Op.]; 48a-49a [Dist. Ct.'s Op.].)

4. *The Search of Petitioner's Personal Documents*

As a separate argument subheading in both courts below (*e.g.*, Appellant's Br., Point I.C.3., at 29-30)). Petitioner argued that even if it were held that Respondent did not violate his Fourth Amendment rights by searching his office, desk, or file cabinets, Respondent nevertheless violated that Amendment by reading Petitioner's private papers therein--personal file cards and personal files--for the purpose of finding his notes on Respondent's misconduct. (*See* Compl. ¶¶ 18 (73a-74a), 24 (76a), 27 (77a).)

While acknowledging Petitioner's allegations that his "belongings," including his "personal file cards" and "personal files," were searched (6a, 18a-19a [2d Cir.'s Op.]; 25a. 47a, 49a [Dist. Ct.'s Op.]), the courts below made no mention of the allegation that any search

in this case was effected to obtain Petitioner's notes of Respondent's misconduct. Nor did those courts directly address the issue of the search of Petitioner's private documents, although they did uphold the *seizures* of Petitioner's belongings on the ground that the seizures were effected to safeguard court property, *see supra* part C.3., p. 12.

Moreover, the courts' only discussions of any sort relating to documents was in the context of the examinations of the question of Petitioner's expectation of privacy in his office, desk, and file cabinets. The District Court there said that "[t]he case files, memoranda and correspondence pertaining to judicial matters . . . whether found in file cabinets or desk drawers, must be deemed to be subject to the control of, and inspection by, the judge." (51a.) The Circuit Court, in a passage more fully

quoted above, *see supra* part C.2., p. 11, went further than the District Court: It indicated that the "judge necessarily has access to the files and papers kept by the clerk," which entails access not only to "documents pertaining to a case," but also "the clerk's notes on discussions with the judge," which may include recording of the judge's "confidential thoughts" and "feelings."

5. *The Forcible Removal of Petitioner from the Courthouse*

Petitioner argued to both courts below that under the well-established precedents established by this Court and routinely followed by the lower federal courts, he was seized when he was forced (Compl. ¶ 22 (75a)) to walk with the court officers out of the chambers and out of the courthouse (which, as a member of the public, he had the right to remain in), and when his reentry into the courthouse was barred

(Compl. ¶ 23 (76a)).

The District Court's decision deemed "frivolous" Petitioner's claim that he had been seized, stating that "his liberty was not restrained" because "he was free to go anywhere else that he desired" other than the courthouse. (52a n.3.) The Court of Appeals concurred in all respects, adding that Petitioner was "free to leave" in that neither his wallet nor car keys were taken from him. (19a-20a.)

REASONS FOR GRANTING THE WRIT

I.

In both the unprecedented manner in which it construed this Court's plurality opinion in *O'Connor v. Ortega*, 480 U.S. 709 (1987), and in the stark result it thereby reached that law clerks have no legitimate expectation of privacy in the workplace, the Second Circuit's decision below raises very serious issues warranting this Court's consideration.

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), a four-Justice plurality espoused the view that the question whether a

government employee has a reasonable expectation of privacy in his or her office, or desk or file cabinets therein, "must be addressed on a case-by-case basis." *Id.* at 718 (plurality opinion). Thus, the issue for the *Ortega* plurality was not whether state hospital psychiatrists generally have a reasonable expectation of privacy in their workplaces, but whether the expectation of privacy in the workplace held by the state hospital psychiatrist in that case had been "reduced by virtue of actual offices practices and procedures, or by legitimate regulation." *Id.* at 717; *see id.* at 718-19.[6]

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[6]Since it is argued herein that the courts below were clearly in error in their application of the case-by-case approach adopted by the *Ortega* plurality, this Petition does not address the opinions of the other five Justice in *Ortega*, which take a broader view of a government employee's expectation of privacy in the workplace. 480 U.S. at 730-31 (Scalia, J., concurring in the judgment); *id.* at 732, 737-41 (Blackmun, J., joined by three other Justices). *See also infra* p. 21 note 12.

Were this Court to agree with the courts below with respect to the *meaning* of that plurality

The cases cited with approval in the plurality opinion employ the case-by-case approach in the same manner.[7] So do all of the post-*Ortega* cases relying on the plurality's opinion on the question of an employee's expectation of privacy,[8] even where the employee works in law enforcement

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opinion, then this case would provide the Court with an opportunity to address the issue of the *persuasive authority* of that opinion vis-a-vis those of the other five *Ortega* Justices. *See, e.g.*, *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1333-34 (9th Cir. 1987), *appeal after remand*, 944 F.2d 483 (1991), *cert. denied*, 112 S. Ct. 1514 (1992); 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.4, p. 87 (2d ed. Supp. 1994).

[7] *Mancusi v. Forte*, 392 U.S. 364, 367-70 (1968); *Gillard v. Schmidt*, 579 F.2d 825, 828-29 (3d Cir. 1978); *United States v. Speights*, 557 F.2d 362, 363-65 (3d Cir. 1977); *United States v. Blok*, 188 F.2d 1019, 1020-21 (D.C. Cir. 1951).

[8] Heather L. Hanson, Note, *The Fourth Amendment in the Workplace: Are We Really Being Reasonable?*, 79 Va. L. Rev. 243, 250-51 (1993); *see, e.g.*, *United States v. Mancini*, 8 F.3d 104, 108-10 (1st Cir. 1993); *United States v. Chuang*, 897 F.2d 646, 649-51 (2d Cir.), *cert. denied*, 498 U.S. 824 (1990); *American Postal Workers Union* v. *United States Postal Serv.*, 871 F.2d 556, 559-61 (6th Cir. 1989).

or the military.[9]

Nevertheless, despite urgings by Petitioner to the contrary, the Second Circuit ignored the allegations in the Complaint (77a-78a, ¶ 29) establishing that Petitioner's expectation of privacy had in no way been reduced by practice, procedure, or regulation. The court instead held that the judge/clerk relationship is "unique" and thus that law clerks as a class have no reasonable expectation of privacy in their private offices, or desk or file cabinets therein (16a-17a).

The imprudence of the Second Circuit's supposed application of a "case-by-case" approach is readily apparent. The decision apparently applies to *all* law clerks,

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[9] *E.g., United States v. Taketa*, 923 F.2d 665, 672-73 (9th Cir. 1991); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1333-35 (9th Cir. 1987), *appeal after remand*, 944 F.2d 483, 488-89 (1991), *cert. denied*, 112 S. Ct. 1514 (1992); *United States v. Craig*, 32 M.J. 614, 615 (A.C.M.R. 1991); *United States v. Battles*, 25 M.J. 58, 59-60 (C.M.A. 1987).

regardless of whether they are federal, state, or local, full-time or part-time, permanent or temporary; whether they work in large cities or small towns;[10] whether they work alone for one judge, with other clerks for one judge, or as part of a pool; whether or not they have an intimate working relationship with the judge;[11] whether they have locks, even personal ones, on their desks or cabinets; whether they have special needs that require special privacy; and even whether the judge they work for expressly advises them that they can expect privacy in their workplace. Indeed, a decision that supposedly is intended to foster "an absolutely free flow

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[10]The District Court below seemed to have limited its ruling to "large metropolitan areas." (51a.)

[11]As a former federal judge has recently noted, different members of this very Court have relied on their law clerks to very different degrees. Marvin E. Frankel, *A Matter of Opinions*, N.Y. Times, May 15, 1994, § 4, at 15.

of information between the clerk and the judge" (16a-17a) may end up having the opposite effect.[12]

Moreover, the Second Circuit's decision will be difficult to limit to law clerks. Judges will naturally want it extended to other confidential judicial personnel, such as secretaries and probation officers.[13] Magistrates,

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[12] *Cf. Ortega*, 480 U.S. at 743-47 (Blackmun, J., dissenting) (disapproving of adopting Fourth Amendment per se rules on basis of assumptions unsupported by specific data or evidence); *United States v. Little*, 18 F.3d 1499, 1504 n.5 (10th Cir. 1994) (en banc) (same). Indeed, the Second Circuit's reliance on the *Ortega* plurality's "case-by-case" approach to justify its holding that law clerks have no reasonable expectation of privacy in the workplace, is particularly troublesome because the only per se rule clearly endorsed in *Ortega* regarding the expectation of privacy was Justice Scalia's opinion, concurring in the judgment, that *all* government employees *have* a reasonable expectation of privacy in their nonpublic offices and the desks and file cabinets therein. 480 U.S. at 731. *See also supra* pp. 17-18 note 6.

[13] In *Forrester v. White*, 792 F.2d 647, 654, 656 n.9, 657 (7th Cir. 1986), the court singled out judges as being absolutely immune from damage suits for actions they take against their confidential employees, such as probation officers. This Court unanimously rejected that position, cautioning

administrative law judges, and other quasi-judicial entities will want the decision to apply to their staffs. Members of executive and legislative branches at all levels of government will, of course, expect the decision to cover *their* confidential employees.[14] In fact, since this Court has held that even the President

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judges about their hypersensitivity in ruling in cases in which other judges are defendants. 484 U.S. 219, 225-39 (1988;) *accord Forrester*, 792 F.2d at 663 (Posner, J., dissenting); *cf. Nixon v. United States*, 113 S. Ct. 732, 738-39 (1993) (Framers recognized difficulty judges have in sitting in judgment on their peers); *United States v. Pollard*, 959 F.2d 1011, 1030-31 (D.C. Cir.) (after characterizing as "shocking" the charge by Professor Dershowitz, based on investigation by former Justice Goldberg, that district court judge had ex parte communications with prosecutors prior to sentencing in espionage case, circuit court affirmed district judge's refusal to grant hearing or recuse himself, since the judge denied the "very weak" charge), *cert. denied*, 113 S. Ct. 322 (1992).

The Second Circuit decision below effectively accomplished an end-run around *Forrester* insofar as Fourth Amendment claims are concerned. The District Court's memorandum had extended that end-run to the First Amendment as well. *See supra* part C.1., p. 8.

[14]As one former federal judge has noted, some members of this Court have relied on their clerks *less* than their counterparts in government have on their confidential employees. Frankel, *supra*.

does not have absolute power over physical evidence in his or her *own possession* concerning conversations that took place in his or her *own private office*, *Nixon v. United States*, 418 U.S. 683, 703-16 (1974), the judiciary's position in the eyes of the public would be significantly diminished by its seeming arrogance in placing itself, and only itself, above the law. *See supra* pp. 21-22 note 13; *see also In re Certain Complaints*, 783 F.2d 1488, 1517-25 (11th Cir. 1985) (relying on *Nixon*, holds that federal judge's privilege in documents and conversations exchanged between him and his secretary and law clerks is overridden by public interest in criminal investigation of judge), *cert. denied*, 477 U.S. 904 (1986).[15]

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[15]Not only does the Second Circuit's unique application of the case-by-case analysis in this case place judges in a position above all other employers, but it places law clerks in a position below all other employees, including those in the military and law enforcement, *see supra* p. 19 note

Finally, the Second Circuit's basing its decision that a "judge necessarily has access to the files and papers kept by the clerk" on the supposed necessity that there be "an absolute free flow of information between the judge and the clerk" (16a-17a) raises additional questions. For example, does the clerk have a reciprocal right to indiscriminately rummage through the judge's office, desk, and file cabinets therein? Also, in light of the basis of the Second Circuit's decision, it is not entirely clear the decision must be limited to searches of clerk's office, desk, and file cabinets. If the judge must have

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9, who have traditionally received *less* protection in the workplace than other employees in both the Fourth and First Amendment contexts, *see, e.g.*, *Ortega*, 480 U.S. at 745 n.2 (Blackmun, J., dissenting); *Brown v. Glines*, 444 U.S. 348, 353-58 (1980); *United States v. Chapman*, 954 F.2d 1352, 1366-71 (7th Cir. 1992); *Williams v. Board of Regents*, 629 F.2d 993, 1003 (5th Cir. 1980), *cert. denied*, 452 U.S. 926 (1981). Indeed, the decision below might place law clerks below schoolchildren, *New Jersey v. T.L.O.*, 469 U.S. 325, 337 n.5 (1985), and on a par with persons in prison, *id.* at 338.

"absolute" "access to the papers and files kept by the clerk," why would there by any Fourth Amendment restrictions--notwithstanding the most improper of motives--upon a judge's search of a law clerk's body, documents he or she is carrying, or even briefcase or handbag, whether the clerk is in chambers, the courtroom, the library, or elsewhere in the courthouse?[16]

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[16]The Second Circuit's decision would be somewhat less disturbing if all of the persons who ascend to the bench could be trusted to discharge their duties toward the public and their employees in a reasonable manner. Unfortunately, this is not the case in all jurisdictions.

For example, three of the four New York State Supreme Court justices who were convicted of crimes between 1973 and 1987 sat in the county in which Petitioner worked for Respondent. M.L. Henry Jr., *In Defense of Appointed Judges*, N.Y.L.J., Feb. 29, 1988, at 2. One of those three was convicted in 1985 of "the taking of bribes and the corruption of his judicial office." *United States v. Brennan*, 798 F.2d 581, 582 (2d Cir. 1986). The last of those three committed perjury, while serving as administrative judge of that county, shortly after Petitioner began to work for Respondent. *In re Smith*, 132 A.D.2d 64 (1987).

Also around that time, when his law clerk had refused to continue an extramarital affair with him, the former Bronx County (New York City) Surrogate

II.

The decision below both presents this Court with an issue expressly left open in *Ortega*--the appropriate standard for determining the propriety under the Fourth Amendment of a seizure of personal belongings in the workplace--and directly conflicts with the holding in *Ortega* that a workplace search or seizure violates that Amendment if it is effected for an illegitimate purpose.

In *Ortega*, eight Justices explicitly left open the question of the appropriate standard for evaluating the Fourth Amendment reasonableness of a seizure of a government employee's personal effects in

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Court Judge fired the clerk; searched her office; harassed her over the phone; threatened court officials, her new boyfriend, and her new employer; and lied to the Commission on Judicial Conduct when it was investigating these matters. *In re Gelfand*, 70 N.Y.2d 211, 215, *cert. denied*, 484 U.S. 977 (1987). Quite recently, the former New York State Court of Appeals Chief Judge admitted in his guilty plea in federal court that when he was spurned by his extramarital lover in the early 1990's, he carried on a long-term campaign of kidnapping threats and harassment against her and her child, and used his own staff and a state appellate court presiding justice to compile a dossier on, and obtain the confidential bar file of, her new attorney/companion. N.R. Kleinfield, *Admitting Guilt, Wachtler Offers Account of Plot*, N.Y. Times, April 1, 1993, at A1, B4.

the workplace. 480 U.S. at 729 n.* (plurality opinion); *id.* at 747-48 n.14 (Blackmun, J., dissenting). The Second Circuit below characterized the detention of Petitioner's property as "brief" and hence reasonable (18a-19a), even though, according to the Complaint (75a-77a, ¶¶ 22-28): (1) Petitioner was prevented from taking any of his belongings with him when he was forced out of the courthouse; and (2) when he returned two days later, (a) almost all of his effects were in a carton; (b) his box of personal file cards had been secreted in *Respondent's* office; and (c) he was prevented from taking his personal files with him for an additional number of days. Hence, this case presents the Court with a clear opportunity to examine issues concerning the proper duration and manner of a workplace search of private effects.

Moreover, aside from sustaining the duration and manner of Respondent's seizure

of Petitioner's belongings, the Second Circuit sustained the *purpose* of those seizures, ruling that they were necessary to protect court property from a terminated employee. (17a-19a.) However, as Petitioner made clear to both courts below, such a ruling is flagrantly contrary to both procedural and substantive law.

As the Second Circuit putatively acknowledged (8a-10a), on a motion for judgment on the pleadings on the basis of an alleged failure to state a claim, both the District Court and a reviewing court must accept as true the allegations in the complaint . *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). But the Complaint herein (73a-74a, ¶¶ 18-19; 76a-77a, ¶¶ 24-27) alleges that Respondent seized Petitioner's property upon and after ejecting Petitioner from the courthouse, not for any legitimate work-related reason, but to locate and suppress notes Petitioner had taken about

Respondent's misconduct. Thus, the Second Circuit's upholding the seizure on the basis of a justification which is contested by Petitioner is in direct conflict, not only with the Federal Rules of Civil Procedure, but also with the clear holding of *Ortega* and its progeny that a workplace search or seizure cannot be justified as a matter of law on the basis of a proffered reason contested by the aggrieved party. 480 U.S. at 727-28 (plurality opinion); *id.* at 732 (Scalia, J., concurring in the judgment); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336-37 (9th Cir. 1987), *appeal after remand*, 944 F.2d 483, 488-89 (1991), *cert. denied*, 112 S. Ct. 1514 (1992); *McGregor v. Greer*, 748 F. Supp. 881, 888-89 (D.D.C. 1990).

III.

This case presents the Court with the opportunity to resolve longstanding troubling issues concerning the search of private papers, including the question not addressed in *Ortega* regarding the standards for testing the propriety of such searches when conducted in the workplace.

This Court has long acknowledged the depth of feeling of the Framers of the Constitution that the government not be permitted to intrude upon their most private concerns by rummaging through the personal papers that they keep in their desks, files, and elsewhere. *Boyd v. United States*, 116 U.S. 616 (1886). Indeed, the Fourth Amendment explicitly enumerates "papers" as a protected entity apart from "effects." The Court has also routinely indicated that since papers, books, films, and the like contain material that is protected by the First Amendment, searches of such items should receive special scrutiny to ensure that only those portions

needed for legitimate governmental purposes be read.[17]

Although this Court has never directly addressed the issue,[18] it had been consistently held by the lower federal courts prior to 1987 that a government official conducting an otherwise proper search can only examine portions of such "protected" material--particularly documents--to the extent that the official has a reasonable suspicion that those

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[17] *Maryland v. Macon*, 472 U.S. 463, 468 (1985); *Walter v. United States*, 447 U.S. 649, 655 (1980) (Stevens, J., announcing judgment of the Court); *Zurcher v. Stanford Daily*, 436 U.S. 547, 564-65 (1978); *Andresen v. Maryland*, 427 U.S. 468, 482 n.11 (1976); *Fisher v. United States*, 425 U.S. 391, 401 n.7 (1976) (citing with approval *United States v. Bennett*, 409 F.2d 888, 897 (2d Cir.) (Friendly, J.), *amended*, 415 F.2d 1113, 1115 n.2 (1969), *cert. denied*, 402 U.S. 984 (1971)).

[18] In *Crouch v. United States*, 454 U.S. 952, 953-94 (1981), Justices White and Brennan, dissenting from a denial of certiorari to the circuit court in *United States v. Crouch*, 648 F.2d 932, 933-94 (4th Cir. 1981) (per curiam), stated that the issue of the brief perusal of documents, particularly personal ones, "raises important questions that should be settled" by an "authoritative direction from this Court."

portions relate to the legitimate governmental purpose that justifies the initial search; such an examination begins with a brief perusal of the document, with more intensive inspection limited to those portions as to which reasonable suspicion survives that perusal and further levels of examination.[19] By holding in *Arizona v. Hicks*, 480 U.S. 321, 324-29 (1987) that probable cause, not reasonable suspicion, is required in such situations even as to nonprotected items--such as stereo components--the Court strengthened the protection which had traditionally been

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[19]The case most frequently cited in the area is Judge Friendly's opinion for the Second Circuit in *United States v. Ochs*, 595 F.2d 1247, 1256-58 & n.8 (2d Cir. 1979). Among those cases relying on *Ochs* are *United States v. Iredia*, 866 F.2d 114, 119 (5th Cir.) (per curiam), *cert. denied*, 492 U.S. 921 (1993); *United States v. Isaacs*, 708 F.2d 1365, 1368-70 (9th Cir.), *cert. denied*, 465 U.S. 1021 (1983); *United States v. Heldt*, 668 F.2d 1238, 1266-69 (D.C. Cir. 1981) (per curiam), *cert. denied*, 456 U.S. 926 (1982); *United States v. Weber*, 668 F.2d 552, 565 (1st Cir. 1981) (denial of petition for rehearing), *cert. denied*, 457 U.S. 1105 (1982).

afforded to protected material.

However, *Hicks* did not address the additional issues peculiar to protected material and raised in the cases cited above: whether such searches of protected material are subject to special scrutiny; whether the levels-of-intensity rules still apply to such material; and whether the answers to these two questions are affected by the nature of the material: For example, does a personal diary receive the same protection as a business notebook? *See* 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.6(e) (2d ed. 1987 & Supp. 1994); 2 *id.* § 4.11(c).

More directly related to this case, when it was established three weeks after *Hicks* was decided that only reasonable suspicion was needed to search the workplace of a government employee, *O'Connor v. Ortega*, 480 U.S. 709, 725-26

(1987) (plurality opinion); *see id.* at 732 (Scalia, J., concurring in the judgment), the Court was not confronted with any issue concerning the search of the belongings of the employee.[20] Thus, several questions are raised. Does the probable cause requirement of *Hicks* apply to the search of items seized during a workplace search, since the initial search need only be based on reasonable suspicion? If not, does protected material at least receive special consideration, especially if it is very personal, such as a diary?

While one commentator has simply noted the existence of an interplay between *Ortega* and *Hicks*, Heather L. Hanson, Note, *The Fourth Amendment in the Workplace: Are We Really Being Reasonable?*, 79 Va. L. Rev.

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[20]Although there was no search of private belongings in *Ortega*, there was a seizure of such items. However, eight Justices in that case expressly left open the question concerning standards relative to such seizures. *See supra* part II., pp. 26-27.

243, 268-71 (1993), federal cases construing *Ortega* have not recognized that interplay, and have dealt in an unfocused manner with some of the issues discussed above concerning the search of documents.[21]

The instant case would provide the Court with ample opportunity to examine many of these unresolved issues. Petitioner argued below, on the basis of the Complaint, that Respondent searched his personal file cards and files in order to find his notes on Respondent's misconduct; the Second Circuit acknowledged that Petitioner complained of the search of his private documents and ruled that none of the searches conducted by Respondent

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[21] *E.g.*, *United States v. Mancini*, 8 F.3d 104, 108 (1st Cir. 1993); *Schowengerdt v. United States*, 944 F.2d 483, 488-89 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1514 (1992); *United States v. Chuang*, 897 F.2d 646, 650-51 (2d Cir.), *cert. denied*, 498 U.S. 824 (1990); *Director of Office of Thrift Supervision v. Ernst & Young*, 795 F. Supp. 7, 10-11 (D.D.C. 1992); *McGregor v. Greer*, 748 F. Supp. 881, 889 (D.D.C. 1990).

violated the Fourth Amendment, albeit without directly addressing Petitioner's claim regarding the search of his personal papers. *See supra* part C.4, pp. 13-15.

While that ruling might be attributable to a clearly erroneous failure on the part of that court to decide Petitioner's claim or to accept the allegations in the Complaint as to the scope of, and motive for, the search of those papers, *see supra* part II., p. 27-29, it is more likely that the court actually held that Petitioner had no legitimate expectation of privacy in his private papers in chambers. The court's only consideration of the matter of documents appears in its discussion of a law clerk's expectation of privacy in his or her office and desk and file cabinets therein; and that discussion focused almost entirely on the "absolute" need for a judge to have complete access to the papers in the

clerk's possession, including notes about the judge's "confidential thoughts" and "feelings." (16a-17a.)

A lower court's clear disregard of an argument, the facts, or the law sometimes leads this court to summarily reverse the judgment on a petition for certiorari.[22] However, notwithstanding the possibility that the Second Circuit merely ignored Petitioner's challenge to the search of his private papers, it would seem that plenary consideration of the document search issues would be appropriate, since (1) it appears more likely that the Second Circuit actually held that law clerks have no reasonable expectation of privacy in any papers in their office or desk or file cabinets therein; (2) the case in any event

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[22] *See, e.g., Burden v. Zant*, 114 S. Ct. 654, 655 (1994) (unanimous per curiam summary reversal). *But see, e.g., Stansbury v. California*, 114 S. Ct. 1526, 1528-30 (unanimous per curiam opinion); *Burden v. Zant*, 498 U.S. 433, 436-38 (1991) (same).

raises vital issues regarding the scope of searches of private papers, which issues have not been directly addressed by this Court and which, in the context of the workplace, were not addressed in *Ortega*; and (c) the issue of the search of private documents in the workplace is intimately connected with the previous two Reasons for Granting the Writ herein.[23]

IV.

The decision below gives the Court an opportunity to rule on interwoven two issues about which the lower federal courts had essentially always been in agreement and which this Court has never directly confronted: the Fourth Amendment ramifications of the forcible movement of a person from one place to another, without any further detention, and the placing of restrictions on a citizen's right to enter a courthouse.

This Court has stopped just short of holding that a forced movement of a person

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[23]Indeed, this Court granted full certiorari in *Ortega* even though the record in that case was unsettled and the circuit court had not explained one of its rulings reviewed by this Court. 480 U.S. at 714, 726-29 (plurality opinion).

from one location to another, in the absence of any additional detention, constitutes a Fourth Amendment seizure. In *Sibron v. New York*, 392 U.S. 40, 63 (1968), this Court indicated in dictum that a seizure occurs when an individual moves from inside to outside a restaurant pursuant to a police officer's order. This aspect of *Sibron* was cited approvingly in *United States v. Mendenhall*, 446 U.S. 544, 557-58 (1980); *id.* at 553 (Stewart, J., joined only by Rehnquist, J.) in the context of a citizen's accompanying an officer from one location to a nearby office. In those cases and others, the Court has repeatedly endorsed the view that a person is seized if the police conduct "'would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida v. Bostwick*, 111 S. Ct. 2382, 2387 (1991) (quoting *Michigan v.*

Chesternut, 486 U.S. 567, 569 (1988)).

Thus, the circuit courts, including the Second Circuit, have repeatedly acknowledged that a seizure exists where there is a forced movement, however brief, from one unconfining location to another;[24] and that seizures exist in other types of situations where the citizen is at no time forced to remain in one place.[25]

Nevertheless, despite being alerted by Petitioner to the above precedents, and despite acknowledging (6a) that the Complaint (75a-76a, ¶¶ 22) indicated that

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[24] *Morgan v. Woessner*, 997 F.2d 1244, 1252-54 (9th Cir. 1993), *petition for cert. dismissed sub nom. Searle v. Morgan*, 62 U.S.L.W. 3473 (U.S. Jan. 10, 1994) (No. 93-810); *United States v. Laboy*, 979 F.2d 795, 799-800 (10th Cir. 1992); *United States v. Springer*, 946 F.2d 1012, 1014-17 (2d Cir. 1992); *United States v. Lee*, 916 F.2d 814, 816, 819 (2d Cir. 1990); *United States v. Moreno*, 897 F.2d 26, 30-31 (2d Cir.), *cert. denied*, 497 U.S. 1009 (1990).

[25] *United States v. Jones*, 990 F.2d 405, 408 (8th Cir.), *cert. denied*, 114 S. Ct. 350 (1993); *United States v. Wilson*, 953 F.2d 116, 122-23 (4th Cir. 1991); *United States v. Thompson*, 941 F.2d 66, 68-70 (2d Cir. 1991).

court officers "forced" Petitioner to leave the chambers and the courthouse in their company, the Second Circuit held that Petitioner was not seized. Adopting the words of the District Court, the Court of Appeals reasoned that Petitioner "was 'free to go anywhere else he desired,' with the exception of [Respondent's] chambers and the court house." (19a-20a [2d Cir.'s Op.]; 52a n.3 [Dist. Ct.'s Op.].)

The decision below is especially disturbing because Petitioner was not only forced to move from one location to another, but was then prevented from returning into the building from which he had been removed--a building which was not only open to the public, but was required to be so by the Constitution and a state statute.[26] Although this Court has never

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[26] *E.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); N.Y. Jud. Law § 4 (McKinney 1983).

In arguing to the courts below that several of

addressed the issue, lower federal courts, including courts in the Second Circuit prior to this case, have consistently held that the Fourth Amendment places restrictions on government attempts to restrict access to courthouses.[27]

The broader difficulties with the decision below are obvious. In contrast to its treatment of the workplace search, the Second Circuit made no attempt to limit its body seizure holding to law clerks. Thus,

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Respondent's actions violated Petitioner's First Amendment right of access to criminal proceedings, Petitioner claimed that a violation of that right occurred when he was forcibly removed from the courthouse and his reentry was barred. (*E.g.*, Appellant's Br. at 36.) In this Petition, Petitioner raises that claim to the extent that it bears on the Fourth Amendment challenge to that ejection and restraint. *See supra* part C.1., p. 9 note 5; *see also* Sup. Ct. R. 14.1(a).

[27] *Klarfield v. United States*, 944 F.2d 583, 586-87 (9th Cir. 1991) (per curiam); *Justice v. Elrod*, 832 F.2d 1048, 1049-50 (7th Cir. 1987) (Posner, J.); *McMorris v. Alioto*, 567 F.2d 897, 899-900 (9th Cir. 1978) (then Cir. J., now Justice, Kennedy); *Downing v. Kunzig*, 454 F.2d 1230, 1232-33 (6th Cir. 1972); *Legal Aid Soc'y v. Crosson*, 784 F. Supp. 1127, 1130-31 (S.D.N.Y. 1992).

under that decision, no government employee is protected by the Fourth Amendment from being arbitrarily, or maliciously, ejected from his or her place of work and prevented from reentering it.

Moreover, nothing in the decision below limits the holding to government employees in the workplace, or places restrictions on the duration of the movement or the number of times such a movement can be compelled. Can the police, without restraint by the Fourth Amendment, now order citizens to move from any location to any other location, as long as the citizens are "free to leave" at the end of their trips? Can the police order someone out of one building, and then into another, an innumerable amount of times?

V.

It would be more appropriate for this Court to grant certiorari on the Fourth Amendment issues now, rather than waiting until the entire case is completed.

Although the instant case has not been completed, the Fourth Amendment claims have.[28] The case is over three years old, and, despite Petitioner's best efforts to move the case quickly, *see supra* part B., pp. 7-8 note 4, discovery has not even begun. If the Second Circuit's opinion is not reviewed now, it may be a long time before this Court will have an opportunity again to consider the case. Since that opinion takes extreme positions on some very important issues--particularly ones involving the relationship between judges and law clerks throughout the country--a quick resolution should be had. Indeed, it is unlikely that any other law clerk will raise such issues in the interim, if ever. *See Forrester v. White*, 792 F.2d 647, 663 (7th Cir. 1986) (Posner, J., dissenting), *rev'd*, 484 U.S. 219 (1988).

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[28]This Court granted certiorari in a nonfinal case in *Ortega*. 480 U.S. at 714 (plurality opinion).

Further, in light of the extreme financial and career hardships Petitioner's discharge and this case have imposed upon him, *see supra* part B., pp. 7-8 & note 4, he may be forced to agree to a premature, unsatisfactory settlement of the case in the absence of a stronger signal than the one sent by the Second Circuit below that both substantive and procedural law must be observed implicitly.[29] And, of course, if

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[29] In *Rodriguez v. United States*, 480 U.S. 522 (1987) (per curiam), this Court, with essential unanimity, accepted Petitioner's argument that a case that was otherwise not particularly worthy of the Court's consideration should be accepted in order to send a strong signal to the Second Circuit that this Court's jurisprudence on statutory construction is not to be ignored.

The circuit courts have frequently recognized that the cases of federal civil rights litigants can be effectively destroyed if the courts overseeing them do not exercise vigilance about unwarranted delays, particularly those caused by clearly improper rulings. *Reynaga v. Cammisa*, 971 F.2d 414, 417-18 n.4 (9th Cir. 1992); *Yates v. City of Cleveland*, 941 F.2d 444, 449 (6th Cir. 1991); *Weir v. Probst*, 915 F.2d 283, 286 (7th Cir. 1990) (Posner, J.); *Crippa v. Dukakis*, 905 F.2d 553, 556-57 (1st Cir. 1990); *Abel v. Miller*, 904 F.2d 394, 396 (7th Cir. 1990) (Easterbrook, J.); *Apostol v. Gallon*, 870 F.2d 1335, 1339-40 (7th Cir. 1989) (Easterbrook, J.).

a settlement is reached, this Court will not have a later opportunity to decide the Fourth Amendment issues presented by the case.

CONCLUSION

For the reasons state above, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1, 1994

Supreme Court, U.S.
FILED

931943 JUN - 1 1994

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BRIAN SHEPPARD,
Petitioner,

v.

LEON BEERMAN,
as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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87 pp

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 536

August Term, 1993

Docket No. 93-7658

Argued: November 2, 1993

Decided: March 3, 1994

BRIAN SHEPPARD,

Plaintiff-Appellant,

v.

LEON BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,

Defendant-Appellee.

Before:

OAKES, KEARSE, and ALTIMARI,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Glasser, J.),

dismissing plaintiff-appellant's complaint on the pleadings pursuant to Fed. Civ. P. 12(c).

Affirmed, in part, and vacated and remanded, in part.

BRIAN SHEPPARD, New Hyde Park, N.Y., *Pro Se*.

JOHN J. SULLIVAN, Assistant Attorney General of the State of New York, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, Albany, N.Y., of counsel), for *Defendant-Appellee*.

ALTIMARI, *Circuit Judge*:

Plaintiff-appellant Brian Sheppard, appearing pro se, appeals from a judgment of the United States District Court for the Eastern District of New York (Glasser, J.), dismissing his complaint on the pleadings pursuant to Fed. R. Civ. P. 12(c) ("Rule 12(c)"). Sheppard, a law clerk to defendant-appellee Leon Beerman, a justice of the Supreme Court of the State of New York, was discharged following a heated dispute with Beerman. Sheppard subsequently brought

an action under 42 U.S.C. § 1983 (1988) alleging that his discharge and Beerman's conduct following the discharge violated his First and Fourth Amendment rights. In his complaint, Sheppard claimed that he was fired in "retaliation for [his] protesting, and [sic] considering to expose, judicial misconduct." He further alleged that subsequent to the discharge, Beerman illegally searched his office and seized his belongings. The district court dismissed Sheppard's claims on the pleadings, finding that he failed to state any cognizable constitutional claims. On appeal, Sheppard challenges the dismissal of each of his claims, generally arguing that the district court made certain improper factual findings in ruling on Beerman's Rule 12(c) motion to dismiss on the pleadings. For the reasons discussed below, we agree with Sheppard only as to one of his First Amendment claims. Accordingly, we affirm, in part, and vacate

and remand, in part.

BACKGROUND

Sheppard served as a law clerk to Beerman from 1986 until he was fired on December 11, 1990. Because this case comes to us on a motion to dismiss, we must view the facts in the light most favorable to Sheppard. Accordingly, his view of the facts alleges the following series of events preceding and following his discharge.

Sheppard alleges that on December 6, 1990, after engaging in *ex parte* communications with the prosecution in a pending murder case, Beerman ordered him to draft a decision denying the defendant's pending speedy trial motion without a hearing, regardless of the motion's merits, so that the defendant would stand trial at a time advantageous to the prosecution. Sheppard refused to follow Beerman's direction, stating that he would not take part in the "railroading" of the defendant.

Beerman responded that although Sheppard was not being discharged, he should seek other employment if he felt that way.

At this time, Sheppard informed Beerman that he had taken extensive notes of instances of other judicial misconduct by Beerman during the preceding four years of Sheppard's service in chambers. As an example, Sheppard noted a case that Beerman had assigned to himself in order to take personal revenge against the accused. Beerman expressed concern about Sheppard making his notes public. Harsh words were exchanged between the parties: Sheppard called Beerman "corrupt" and a "son of a bitch," and Beerman called Sheppard "disturbed" and "disloyal." Sheppard immediately apologized for his characterization. The argument ended with no resolution, and Sheppard worked the remainder of the day.

When Sheppard next returned to work on December 11, 1990, he was removed from

chambers by court officers, who informed him that Beerman had fired him. Sheppard was forced to leave immediately and not allowed to take his belongings with him. Both before and after his discharge on that day, Sheppard's property was searched by Beerman or by others at his direction. Specifically, Sheppard's file cabinets and desk drawers were searched, and a box of his personal file cards was seized and removed to Beerman's private office and examined. On December 13, 1990, Sheppard was permitted to return to chambers accompanied by court officers to retrieve certain of his belongings. On December 21, 1990, he was permitted to retrieve the rest of his personal files.

Following his discharge, Sheppard returned to Beerman's courtroom on a number of occasions. On January 18, 1991, while attending Beerman's calendar call, Sheppard began ruffling through court files. Beerman subsequently directed him to leave the

courtroom if he wished to examine documents. On January 28, 1991, Beerman told an attorney not to speak with Sheppard and warned Sheppard not to involve himself in the cases Sheppard had worked on when he was a clerk. On February 11, 1991, Sheppard was told not to keep coming in and out of the courtroom, and was told to be quiet when he sought to reply to this direction.

Sheppard's Lawsuit

In April 1991, Sheppard commenced an action under 42 U.S.C. § 1983, alleging that the above actions by Beerman violated Sheppard's First Amendment right to free speech, his First Amendment right of access to criminal proceedings and documents, his First Amendment right to petition the government for redress of grievances, and his Fourth Amendment right to be free from unlawful searches and seizures. Sheppard also asserted pendent state law tort claims for, among other things, false imprisonment,

trespass, conversion, and defamation. Beerman filed an answer and then moved for judgment on the pleadings pursuant to Rule 12(c) on the grounds that Sheppard had not met threshold pleading requirements, that the complaint failed to state a cause of action, and that Beerman was entitled to qualified immunity.

On May 21, 1993, the United States District Court for the Eastern District of New York (Glasser, *J.*) granted Beerman's motion for judgment on the pleadings on the grounds that Sheppard could not state any cognizable constitutional claim under any set of facts as a matter of law. Having held that plaintiff failed to state any cognizable constitutional claims, the court declined to exercise its pendant jurisdiction over plaintiff's state law claims.

Sheppard now appeals.

DISCUSSION

We review the district court's grant of

Beerman's motion to dismiss Sheppard's claims *de novo*. *See Grimes v. Ohio Edison Co.*, 992 F.2d 455, 456 (2d Cir.), *cert. denied*, 114 S. Ct. 467 (1993). In deciding a Rule 12(c) motion, we apply the same standard as that applicable to a motion under Rule 12(b)(6). *See Ad-Hoc Comm. of Baruch Black and Hispanic Alumni Ass'n v. Bernard M. Baruch College*, 835 F.2d 980, 982 (2d Cir. 1987). Under that test, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, (1957)). This standard is "applied with particular strictness when the plaintiff complains of a civil rights violation." *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991) (citations

omitted).

On appeal, Sheppard generally contends that the district court erred in finding that he had not stated cognizable constitutional claims. Each of Sheppard's First and Fourth Amendment claims will be discussed in turn.

I. *First Amendment Claims*

a. *Free speech claims*

Sheppard first contends that the district court made improper factual findings in dismissing his claim that his discharge amounted to a violation of his First Amendment right to free speech. We agree, and for the reasons discussed below vacate the district court's dismissal of that claim and remand for proceedings not inconsistent with this opinion.

A state may not discharge an employee for reasons which infringe on that employee's constitutionally protected interest in freedom of speech. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). If an employee is

discharged for making statements concerning a matter of public concern, the employee's freedom of speech may have been violated. *See Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 146 (1983). In such a situation, the Court must balance the employee's interest in making the statement against "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Rankin*, 483 U.S. at 388 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

Sheppard specifically alleges that he was dismissed in retaliation for his exercise of free speech in confronting Beerman about the judge's alleged misconduct. In order for Sheppard's claim to withstand a motion to dismiss on the pleadings, he must establish that his speech concerned a matter of public concern, and that the speech was a motivating factor in his discharge. *See Frank v. Relin*,

1 F.3d 1317, 1330 (2d. Cir.), *cert. denied*, 114 S. Ct. 604 (1993). Speech will be fairly characterized as a matter of public concern if the speech "relat[es] to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. Whether speech involves a public concern is a question of law to be determined on the basis of the "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48 & n.7.

In analyzing the validity of Sheppard's claim, the district court made a determination that Sheppard was actually discharged for insubordination and not for his speech. We find this determination problematic for two reasons. First, the motive behind Sheppard's firing in his retaliation claim is clearly a question of fact. *See Frank v. Relin*, 1 F.3d at 1328-29. Because this question is in dispute, it was improper for the district court to answer it

on a motion for dismissal on the pleadings. Second, the district court's determination that Sheppard was actually dismissed for insubordination seemed to impact its determination that Sheppard's speech was not a matter of public concern. Because the reason for Sheppard's dismissal is not relevant to the legal determination of whether his speech was a matter of public concern, we find fault with the district court's public concern analysis. Accordingly, we reverse the district court's dismissal of Sheppard's First Amendment free speech claim and remand for proceedings not inconsistent with this opinion.

b. *Remaining First Amendment claims*

Sheppard next contends that the district court erred in dismissing his claims concerning a violation of his First Amendment right of access to criminal cases, and his First Amendment right to petition the government for redress of grievances. As to

these contentions we disagree. Even assuming that all the facts alleged by Sheppard in his complaint are true, we find, as did the district court, that the facts do not support either of those claims.

Sheppard claims that Beerman violated his right to access to criminal proceedings by (i) directing Sheppard to examine court files outside of the courtroom; (ii) telling certain attorneys that it would be improper for them to speak to Sheppard about anything that Sheppard had learned during his tenure as Beerman's law clerk; (iii) refusing to field courtroom questions by those who were not parties to cases on the calendar; and (iv) admonishing Beerman to stop using the courtroom as a "revolving door" when Sheppard went in and out of Beerman's courtroom during a calendar call. Even assuming that all of the above incidents occurred, they do not indicate that Sheppard was denied a right of access to criminal proceedings. Sheppard

admits that he was allowed to examine files outside of Beerman's courtroom, and that he was also permitted to listen to cases as long as he did not disrupt Beerman's courtroom proceedings or waste the court's time. Clearly, Beerman was entitled to exercise his discretion in keeping decorum in his courtroom.

Sheppard's claim that he was deprived of his right to petition for redress of grievances is equally without merit. The instant action provides such a vehicle. Accordingly, we affirm the district court's dismissal of these claims.

II. *Fourth Amendment Claims*

A. *Search/Seizure of Office, Desk, and File Cabinets*

Sheppard alleges that after the dismissal, Beerman searched his office, desk, and file cabinets in violation of his Fourth Amendment rights. "A 'search' occurs when an expectation of privacy that society is

prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). *See also O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). The district court ultimately concluded that Sheppard had no reasonable expectation of privacy in his office furniture or file cabinets, and therefore any search was not violative of Sheppard's Fourth Amendment rights. For the reasons discussed below, we agree.

An "employee's expectation of privacy must be assessed in the context of the employment relationship." *Ortega*, 480 U.S. at 717. The working relationship between a judge and her law clerk, as noted by the district court, is unique. Unlike a typical employment relationship where an employer may limit the information she wants to share with her employees, in order for a judicial chambers to function efficiently, an absolute free flow of information between the clerk and the

judge is usually necessary. Accordingly, the clerk has access to all the documents pertaining to a case. More importantly, clerks regularly have access to the judge's confidential thoughts on a case. The judge may discuss her feelings with her clerk, or may allow the clerk access to her personal notes. In turn, the judge necessarily has access to the files and papers kept by the clerk, which will often include the clerk's notes from discussions with the judge. Because of this distinctive open access to documents characteristic of judicial chambers, we agree with the district court's determination that Sheppard had "no reasonable expectation of privacy in chambers' appurtenances, embracing desks, file cabinets or other work areas." Accordingly, the district court was correct in finding that there was no violation of Sheppard's Fourth Amendment rights.

Moreover, we also agree with the

district court's finding that any alleged seizure done in connection with the search was similarly not violative of Sheppard's Fourth Amendment rights. Even assuming that Sheppard's belongings were seized for a short time during the judge's search of his things, a short delay by a judicial employer in returning a disgruntled employee's belongings after the employee has been fired does not rise to the level of a Fourth Amendment violation. The unlawfulness of an interference with an individual's possessory interest in property depends on the reasonableness of the seizure. *See Soldal v. Cook County*, 113 S. Ct. 538, 549 (1992). Because a judicial employer has an overriding interest in securing the confidentiality of chambers' work product and in making sure that an angry clerk does not attempt to confiscate or destroy important court property, the brief alleged withholding of Sheppard's belongings while they were

searched was not unreasonable.

B. *Seizure of Sheppard's Person*

Sheppard's final claim is that there was an unlawful seizure of his person when he was escorted out of the courthouse by court officers on December 11, 1990. The district court dismissed this claim finding that Sheppard's liberty was never restrained. We agree.

In order to determine whether a particular encounter between police officers and an individual constitutes a "seizure" for the purposes of the Fourth Amendment, a court must decide "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

In the present case, as correctly noted by the district court, Sheppard was "free to go anywhere else that he desired," with the exception of Beerman's chambers and the court

house. Had Beerman retained Sheppard's car keys or his wallet, then perhaps Sheppard arguably could have been seized, because it would have prevented him from being "free to leave." *See, e.g., United States v. Lee*, 916 F.2d 814, 819 (2d Cir. 1990) (noting factors that might suggest a seizure include "prolonged retention of a person's personal effects, such as airplane tickets or identification."). Because there are no such allegations in Sheppard's complaint, Sheppard has failed to state a claim that his person was seized.

We have examined Sheppard's remaining contentions and find them to be without merit.

CONCLUSION

Based on the foregoing, we affirm the district court's dismissal of all of Sheppard's claims other than his First Amendment free speech claim. Regarding that claim, we find that in concluding that

Sheppard failed to state a violation of his First Amendment right to free speech, the district court made certain factual determinations that were not appropriate on a motion for judgment on the pleadings. Accordingly, we vacate the district court's dismissal of Sheppard's First Amendment freedom of speech claim on the pleadings and remand for proceedings not inconsistent with this opinion. In doing so, however, we make no comment on the merits of the claim nor do we preclude the district court from re-examining the matter at some future, more appropriate time in the proceedings. Our ruling today is based only on the procedural posture in which the case came before the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BRIAN SHEPPARD,

Plaintiff,

-against-

LEON BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,

Defendant.

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CV-91-1349

MEMORANDUM AND ORDER

May 21, 1993

I. Leo GLASSER, United States District Judge:

Plaintiff Brian Sheppard commenced this civil rights action against defendant Leon Beerman, Justice of the Supreme Court of the State of New York, alleging that the defendant violated his First and Fourth Amendment rights in discharging him from employment as defendant's law clerk.

Defendant moves for a judgment of dismissal on the pleadings under Fed. R. Civ. P. 12(c). In addition, plaintiff appeals various determinations of the magistrate judge relating to discovery matters, and moves this Court to vacate its prior referral order to the magistrate judge. For the following reasons, defendant's motion is granted and plaintiff's motions are denied.

FACTS

Plaintiff served as a law clerk to defendant until he was fired on December 11, 1990. Plaintiff claims that his dismissal resulted from a heated dispute on December 7, 1990, over the ethical propriety of defendant's actions and decisions in two criminal cases. The complaint notes that harsh words were exchanged between the parties: plaintiff admits calling defendant "corrupt" and a "son of a bitch", and further asserts that he in turn was called "disturbed" and "disloyal." *Id.* ¶ 14. In

addition, plaintiff alleges that he informed defendant at that time that he had written extensive notes of instances of other judicial misconduct during the preceding four years of his service in chambers. Complaint ¶¶ 8-15.

When plaintiff returned to work on December 11, 1990, he was removed from chambers by court officers, who informed him that defendant had fired him. *Id.* ¶ 22. The complaint further alleges that plaintiff was not permitted to retrieve his personal effects at that time, and that both before and after his discharge on that day, plaintiff's property was searched by defendant or by others at defendant's direction. *Id.* ¶¶ 19-20, 24. However, plaintiff concedes that he wad allowed to return to chambers to retrieve his property on December 13 and 21, 1990, when accompanied by court officers, and plaintiff indicates that he is unsure whether all of his personal

effects were returned. *Id.* ¶¶ 24-28.

Plaintiff also alleges that defendant made, and has continued to make, untrue and defamatory statements about him. *Id.* ¶¶ 30-33. He also asserts that on January 18, 1991, when he attended calendar call in defendant's courtroom, Justice Beerman directed him to leave the courtroom if he wished to examine court files. *Id.* ¶ 34. In addition, during a subsequent visit to the courtroom on February 11, plaintiff was allegedly told not to keep coming in and out of the room, and was told to be quiet when he sought to reply to this direction. *Id.* ¶ 37.

Plaintiff commenced this action in April 1991 under 42 U.S.C. § 1983, alleging that defendant deprived him of his First and Fourth Amendment rights in the events surrounding and subsequent to plaintiff's dismissal. Plaintiff also asserts pendent state law tort claims for, *inter alia*, false imprisonment, trespass, conversion, and

defamation. Defendant filed an answer to the complaint on May 8, 1991.

Defendant now moves for judgment on the pleadings under Fed. R. Civ. P. 12(c). Plaintiff appeals from certain pre-trial orders of the magistrate judge and requests that this Court vacate its prior referral order to the magistrate judge. These motions will be addressed in turn.

I. *Rule 12(c) Motion*

Normally, a motion to dismiss all or part of an action for failure to state a claim may be brought under Fed. R. Civ. P. 12(b)(6). However, because the language of Rule 12(b) limits motions under its terms to the time period before the close of the pleadings, and because Rule 12(h)(2) nevertheless permits motions to dismiss for failure to state a claim at any time up to and during the trial, Rule 12(c) may be used as a vehicle for making such a motion after the close of pleadings. *See generally* 5A

Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1367 (2d ed. 1990).

In deciding a Rule 12(c) motion, the court should apply the same standard as that applicable to a motion under 12(b)(6). *Ad-Hoc Comm. of Baruch Black & Hispanic Alumni Ass'n v. Bernard M. Baruch College*, 835 F.2d 980, 982 (2d Cir. 1987). Under that test, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

As a preliminary matter, defendant challenges the complaint as being too broad and conclusory to support a § 1983 claim. A fair reading of the complaint, however, reveals that it sets forth in detail the

particular events and transactions giving rise to this action, as well as the specific constitutional violations of which the plaintiff complains. An analysis of the claims follows.

1. *First Amendment claims*

While a state "may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech," *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)), it has long been recognized that "the government has a legitimate interest in regulating speech of its employees that differs significantly from its interest in regulating the speech of [the] general [public]." *Piesco v. City of New York, Dep't of Personnel*, 933 F.2d 1149, 1155 (2d Cir.) (citing *Rankin*, 483 U.S. at 383-84), *cert. denied*, ___ U.S. ___, 112 S. Ct. 331 (1991)).

As a threshold matter, an employee

asserting a First Amendment claim must show that the speech in question "may be 'fairly characterized as constituting speech on a matter of public concern.'" *Rankin*, 483 U.S. at 384 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)). This determination is a question of law for the court, *Connick*, 461 U.S. at 148 n.7, based on "the content, form, and context of a given statement, as revealed by the whole record." *Rankin*, 483 U.S. at 385 (quoting *id.* at 147-48). If the court determines that the state employee's statement pertains to a matter of public concern, it must then balance the employee's interest in making the statement against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Rankin*, 483 U.S. at 388 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). In balancing the countervailing interests of the public employee and employer under *Pickering*,

the court must not consider the employee's statement in a vacuum; rather, "the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Id.*[1]

In this case, even after accepting the allegations in the complaint as true, it appears "beyond doubt" that plaintiff cannot prove any facts which would entitle him to relief. Because Sheppard's statements did not address a matter of public concern, his First Amendment rights were not implicated by his discharge. The content, form, and context of his statements reflect convincingly that they

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[1]The *Pickering* balancing test is also a question of law for the court. *Piesco*, 933 F.2d at 1154-55 (citing *Connick*, 461 U.S. at 148 n.7); *but see Vasbinder v. Ambach*, 926 F.2d 1333, 1340 (2d Cir. 1991) ("We can envision cases in which the question of the degree to which the employee's speech could reasonably have been deemed to impede the employer's efficient operation would properly be regarded as a question of fact, to be answered by the jury prior to the court's application of the *Pickering* balancing test.").

manifest a law clerk's insubordination to his employer, a state judge, and were not uttered to address a matter of public concern. He called the defendant judge "corrupt" and used the expletive "son-of-a-bitch." Complaint ¶ 14. In addition, plaintiff concedes that his statements were made in the context of his refusal to follow the defendant judge's direction to draft a decision on a pending speedy trial motion. *Id.* ¶¶ 10, 11.

It is crucial to note that the relationship between a judge and law clerk is an intensely personal and confidential one. It is a relationship of a considerably different dimension than the conventional relationship between an employer and an employee. The personal and professional demeanor of a law clerk reflects not only upon the judge with whom he works, but upon the judiciary as a whole. It is not overstating the case to say that "the punctilio of an honor the most sensitive,"

Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, J.), is the standard of behavior that a law clerk must observe. The plaintiff's behavior fell egregiously short of that standard. That shortfall and his insubordination, not a disregard for his First Amendment rights, compelled his discharge.

The unassailable validity of the uniqueness of that relationship, even in the context of First Amendment considerations, was plainly recognized in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), which points the way to decision here. In that case, the plaintiff, a high school teacher, was dismissed for sending a letter to a local newspaper that was critical of the way the defendant Board of Education and the superintendent of the schools had handled past proposals to increase taxes for the benefit of the schools. *Id.* at 565-66. The Court decided that the plaintiff's rights to

freedom of speech were violated, but in the course of its opinion made the following observations which are peculiarly pertinent here:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, . . . we shall indicate some of the general lines along which an analysis of the controlling interests should run.
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> . . .
>
> The [plaintiff's] statements are in no way directed towards any person with whom [he] would normally be in contact in the course of his daily work as a teacher. *Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. [Plaintiff's] employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationship for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.*

Id. at 569-70 (emphasis added).

Connick v. Myers, 461 U.S. 138 (1983), is also instructive. The plaintiff there, an Assistant District Attorney, was discharged for preparing and distributing a questionnaire soliciting the views of fellow employees regarding office transfer policy, office morale, the need for a grievance committee, the level of confidence in superiors and whether they felt pressure to work in political campaigns. *Id.* at 141. This questionnaire was prepared after the plaintiff resisted a transfer to prosecute cases in a different section of the criminal court. *Id.* at 140. The reasons for her discharge were stated to be her refusal to accept the transfer and that her distribution of the questionnaire was regarded as an act of insubordination. *Id.* at 141. She then brought suit under 42 U.S.C. § 1983, contending that her employment was wrongfully terminated because she had exercised her constitutionally protected right of free

speech. *Id.* The District Court ordered her reinstatement and awarded her back pay, damages and attorney's fees, holding that the true basis for her discharge was the questionnaire which involved matters of "public concern" and was not clearly demonstrated to interfere substantially with the operation of the District Attorney's Office. *Id.* at 141-42.

The Supreme Court reversed, holding that the plaintiff's discharge did not offend the First Amendment. In the course of its opinion the Court, speaking through Justice White said:

> When employee expression cannot be fairly characterized as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. . . .
>
> Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. . . . *[Plaintiff] did not seek to inform the*

> *public that the District Attorney's Office was not discharging its Governmental responsibilities in the investigation and prosecution of criminal cases. Nor did [plaintiff] seek to bring to light actual or potential wrongdoing or breach of public trust on the part of [defendant] and others. . . .*
>
> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark--and certainly every criticism directed at a public official--would plant the seed of a constitutional case. While as a matter good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

461 U.S. at 146-49 (emphasis added). *See also Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (highlighting importance of maintaining discipline in government offices).

Likewise, in *Berry v. Bailey*, 726 F.2d 670 (11th Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985), a deputy sheriff commenced an action under 42 U.S.C. § 1983, alleging that he was terminated for exercising his First

Amendment rights. *Id.* at 673. The deputy had incurred the disfavor of the sheriff when he refused to recommend to a prosecutor that certain charges be dismissed against the daughter of an influential state court judge. *Id.* at 672. All of plaintiff's statements, except for one, concerned that disagreement with his superior. *Id.* at 674. In granting the defendant's motion for judgment notwithstanding the verdict, the district court held that the employee's refusal to obey his superior was not protected by the First Amendment. *Id.* at 675.

The Eleventh Circuit affirmed, noting that:

> While corruption in the Sheriff's office is a matter of legitimate public concern, it is not so vital a matter that it would justify our protection of an employee's flagrant defiance of his direct supervisor. . . . All of *the statements* except [one] *were in direct conflict with the Sheriff.* They took place on the job and concerned [the deputy's] performance of his official duties. These statements are the kind that *Pickering* described as implicating the government's interest; they threaten

> office discipline and harmony in the day-to-day close working relationships with immediate superiors necessary for efficient office functioning. *Under the Pickering analysis, they are not protected speech.* . . .
>
> We agree with the district court that [the plaintiff] is trying to claim that he was fired for doing his job expeditiously and honestly. *While in this case, [the plaintiff's] approach to law enforcement might have yielded a more pristine sheriff's department than that of his superior, we cannot encourage employees to defy their employers and refuse to perform their duties every time they that the employer is running the office improperly.* This is not a case where [the plaintiff] performed his duties according to his superior's wishes, and pursued some outside course of action against the office's inadequate enforcement of the law. Such a fact pattern would have presented a closer case. On these facts, we cannot find any speech that passes the *Pickering* test and is thus constitutionally protected.

Id. at 676 (emphasis supplied). *Accord Finch v. City of Vernon*, 877 F.2d 1497, 1502 (11th Cir. 1989) (employee could be discharged lawfully if failed to heed orders of superior); *Cox v. Dardanelle Pub. Sch. Dist.*, 790 F.2d 668, 675 (8th Cir. 1986) (same holding; applying *Pickering* balancing test).

See Rankin v. McPherson, 483 U.S. 378, 386 n.10 (1987) (recognizing that plaintiff could have been deemed an insubordinate and would then face the possibility "of being fired for failing to follow orders"); *Connick v. Myers*, 461 U.S. 138, 163 n.3 (1983) (Brennan, J., dissenting) (where employee answers "No" to an employer's request to perform a lawful task in the scope of his duties, then "[a]though such a refusal is 'speech,' which implicates First Amendment interests, it is also insubordination, and as such may serve as the basis for a lawful dismissal.").

In his opposition papers, plaintiff artfully seeks to characterize his statements as touching upon matters of public concern involving allegations of misconduct by a state court judge. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978); *Vasbinder v. Ambach*, 926 F.2d 1333, 1339-40 (2d Cir. 1991); *Rookard v. Health and Hosps. Corp.*, 710 F.2d 41, 46 (2d

Cir. 1983). However, the content, form, and context of his statements, as set forth above, belie that characterization.

Sheppard did not make his statements "as a citizen upon matters of public interest, but instead as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147. Those statements were not made to reveal any alleged judicial misconduct because Sheppard never filed a complaint with the proper authorities. In upholding First Amendment claims of state employees, many courts note that the employee notified persons for the purpose of obtaining corrective action. *See, e.g., Vasbinder v. Ambach*, 926 F.2d 1333, 1340 (2d Cir. 1991) (upholding First Amendment claim of terminated state employee who reported wrongdoing and corruption in federally funded program to the FBI); *Rookard v. Health and Hosps. Corp.*, 710 F.2d 41, 46 (2d Cir. 1983) ("An allegation of corrupt and wasteful

practices . . . *made to the city official empowered to investigate such charges*, obviously involves a matter of public concern) (emphasis added); *cf. Berry v. Bailey*, 726 F.2d 670, 676 (11th Cir. 1984) (rejecting plaintiff's First Amendment claim and noting that the plaintiff did not pursue any outside action with the proper authorities).

Here, Sheppard alleges that he observed numerous instances of judicial misconduct while he was defendant's law clerk. Complaint ¶ 7. Yet, during that four year period, he never sought to file a grievance against defendant with the proper authorities. Instead, plaintiff told his employer of the alleged improprieties during a personal, employment dispute. This demonstrates convincingly that plaintiff was engaged in an *ad hominem* attack on the judge, and not expressing himself on a matter of public concern. *See, e.g., Barkoo v. Melby*, 901 F.2d

613, 618-19 (7th Cir. 1990) (employee did not speak on matter of public concern in commenting upon personal grievance with superiors because the speaker's motivation and choice of forum are considered in determining level of public concern); *McEvoy v. Shoemaker*, 882 F.2d 463, 466 (10th Cir. 1989) (statement of police officer did not address matter of public concern because he did not intend to disclose malfeasance of government officials, but to air his own frustrations).[2] Consequently, "absent the

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[2]It is clear that a statement made in private "does not . . . vitiate the status of the statement as addressing a matter of public concern," where indeed it relates to a matter of public concern. *Rankin*, 483 U.S. at 386 n.11; *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979). However, since plaintiff's statements were made during the course of his insubordination, the fact that he uttered them privately--with no intent to file a grievance against defendant--is indicative of their personal nature. *See Connick*, 461 U.S. at 148 n.8 (regardless of whether speaker chooses a public or private forum, "a [statement] not otherwise of public concern does not attain that status because its subject matter could,

(continued...)

most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public [employer] allegedly in reaction to the employee's behavior." *Connick*, 461 U.S. at 147. Accordingly, since this Court concludes as a matter of law that plaintiff's discharge does not implicate the First Amendment because his speech did not address a matter of public concern, we need not engage in the *Pickering* balancing test, *Ezekwo v. NYC Health & Hosps. Corp.*, 940 F.2d 775, 781 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 657 (1991), nor does this case involve a discharge based on speech that contains both protected and unprotected categories of speech, *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

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[2](...continued)
in different circumstances, have been the topic of a communication to the public that might be of general interest.").

Were this Court to balance Sheppard's interest in making the statements against the State's interest in promoting the efficiency of the vital judicial services it provides through its employees, it would unhesitatingly strike the balance in favor of the State. By confronting his immediate superior, Sheppard threatened the institutional efficiency of the judiciary not only by the content of that insubordinate confrontation, but by the manner, time and place in which it occurred. *See Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415 n.4 (1979). There is no constitutional interest to be guarded which required Justice Beerman to tolerate the insolent insubordination of a law clerk which he justifiably believed would "undermine his authority, and destroy close working relationships." *Connick*, 461 U.S. at 154.

Sheppard's additional claims under the First Amendment must likewise be dismissed.

He claims that defendant deprived him of his right to petition for redress of grievances. However, he has not pleaded a cognizable claim for deprivation of that right because this very action affords Sheppard a vehicle for redress within the court system. Similarly, his contention that he was denied access to criminal proceedings and documents, based on defendant's remarks to Sheppard from the bench in January and February 1991, must be denied. It is clear beyond doubt that defendant is clothed with complete power to manage the routine comings and goings in his courtroom, even to the extent of requiring visitors to conduct their research into court records elsewhere or excluding specific persons entirely from the courtroom. It is also worth noting, as defense counsel does, that Sheppard's access to proceedings claim hinges on the requirement that he was not permitted to review court records in defendant's courtroom; his claim does not

assert that he was in fact denied access to the courtroom or any court records. Accordingly, Sheppard's sub-claims under the First Amendment for violation of the rights to redress and access to criminal proceedings must be dismissed.

2. *Fourth Amendment claims*

Plaintiff asserts that defendant violated his Fourth Amendment rights in connection with the search and seizure of his personal effects in chambers. None of these claims warrant extensive discussion. The Fourth Amendment, applicable to the states via the Fourteenth Amendment, protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Plaintiff claims that his property was unlawfully seized when defendant prevented him from collecting his property after he was discharged. Property is seized when "there is some meaningful interference with the

individual's possessory interests in that property," *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), to further the investigatory purposes of government agents. *See id.* at 114, 120-21 (seizure of package occurred when federal agents took custody of package to determine whether it contained narcotics); *United States v. Place*, 462 U.S. 696, 701, 705-708 (1983) (travelers luggage was "seized" when government agents detained luggage while they sought to obtain a search warrant). A reasonable seizure does not run afoul of the Fourth Amendment. *Jacobsen*, 466 U.S. at 121-22.

In this case, plaintiff agrees that defendant was not investigating him for suspected criminal activity. Plaintiff simply alleges that defendant restrained him from collecting his personal effects upon his discharge, but concedes that he was able to retrieve all of his belongings approximately one week later. It is objectively reasonable

for a judge to safeguard court files and to ensure that a terminated law clerk does not remove or destroy court documents in retaliation for his firing. Consequently, requiring plaintiff to return twice to retrieve his property in the company of court officers was reasonable and does not give rise to a § 1983 cause of action.

Plaintiff also claims that defendant violated his Fourth Amendment rights by unlawfully searching his property. However, whether a search implicates the warrant requirement of the Fourth Amendment depends on whether society objectively recognizes a privacy interest in the area to be searched. *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). In *O'Connor*, a psychiatrist at a state hospital commenced a § 1983 action alleging that his employer violated the Fourth Amendment by conducting an unlawful search of his private office and by seizing a

few personal items, which were subsequently used in an administrative proceeding. 480 U.S. at 712-13. The Court upheld the psychiatrist's cause of action, recognizing that a state employee does not relinquish his constitutional rights against unreasonable searches and seizures conducted by his employer in the employee's work area, provided that society would recognize a reasonable expectation of privacy in the area to be searched. *Id.* at 715-717. Since the plaintiff in *O'Connor* had a reasonable expectation of privacy in the personal files stored in his private office containing sensitive psychological data of his private patients, the Court held that his employer's search implicated the Fourth Amendment because society would recognize a reasonable expectation of privacy in that work setting. *Id.* at 718. *See also Gillard v. Schmidt*, 579 F.2d 825, 828 (3d Cir. 1978) (guidance counselor who maintains sensitive student

records has a reasonable expectation of privacy in school desk).

In contrast, the plaintiff's asserted right to the exclusive dominion and control of the appurtenances of a judge's chambers is a dubious one, indeed. As has been discussed above, the relationship between a judge and his law clerk is *sui generis*. The case files, memoranda and correspondence pertaining to judicial matters which virtually inundate the chambers of a judge in large metropolitan areas, whether found in file cabinets or desk drawers, must be deemed to be subject to the control of, and inspection by, the judge.

As the Court noted in *O'Connor*:

> Public employees' expectations of privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures, or by legitimate regulation . . . [and] some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable. . . . Given the great variety of work environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a

case-by-case basis.

480 U.S. at 717-18. The very nature of the work environment that pervades judicial chambers drives this Court to conclude that Sheppard had no reasonable expectation of privacy in chambers' appurtenances, embracing desks, file cabinets or other work areas. Accordingly, the Fourth Amendment claims must be dismissed.[3]

II. *Plaintiff's Appeal from the Magistrate Judge's Order*

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[3]Plaintiff also claims that his person was seized when defendant ordered court officers to remove him from chambers on December 11, 1990, and when defendant ordered him to "sit down and not speak" when he was entering and exiting the courtroom on February 11, 1991. Pl.'s Memo. of Law in Opp'n at 38-39. However, it is clear that these claims are frivolous because plaintiff's person was never "seized" as his liberty was not restrained in either of those instances. *Graham v. O'Connor*, 490 U.S. 386, 396 n.10 (1989). After defendant discharged plaintiff on December 11, the court officers simply escorted him from chambers and from the courthouse; plaintiff was free to go anywhere else that he desired. Similarly, plaintiff's liberty was not restrained on February 11 because he was free to remain in or to leave defendant's courtroom.

This court entered a general referral of all pre-trial matters to Magistrate Judge Ross on May 17, 1991. Since that time, the magistrate judge has met with counsel for the parties on several occasions and has entered several orders. Plaintiff now appeals from four separate elements assertedly incorporated into the magistrate judge's oral order at the conference of January 16, 1992:

> The four discrete rulings . . . to which plaintiff objects are (1) that counsel will not be permitted to administer oaths at the audiotaped depositions, and that plaintiff will have to provide a third person to do so in the event that Ms. Evans [counsel for defendant] arbitrarily decides not to do so; (2) that counsel will not be permitted to operate the tape machines at the depositions, and thus that plaintiff will have to provide a third person to do so at each taping; (3) that all such third persons proffered by plaintiff must be pre-screened by Ms. Evans under vague standards of competence and independence; and (4) that all audiotaped depositions taken on plaintiff's behalf must be transcribed, and that even though it is defendant, and not plaintiff, who wants them all transcribed, plaintiff must pay for all transcriptions unless he can justify shifting the costs to defendant.

Pl.'s Memo. of Law in Supp. of Pl.'s Objections to Magistrate's Orders at 2.

For the reasons set out below, the appeal as to each of these elements is denied.

As to issue number four--the matter of whether all depositions must be transcribed, and which side must pay the cost of transcription--it is clear that this matter is not properly presented for appeal. The magistrate judge's written order, labeled "For purposes of clarification" and endorsed on Sheppard's January 21 letter offering his summary of the January 16 orders, states explicitly that "no requirement was imposed that all depositions be transcribed . . . ." ¶ 2. As regards the allocation of costs, it is clear that this question was never in fact conclusively settled before the magistrate judge. The transcript of the January 16 conference reveals the following remarks:

THE COURT: I would like you to brief

> that limited issue, okay? And not massive, just send me a letter brief, just on that issue--
>
> MR. SHEPPARD: Right.
>
> THE COURT:--not other issues.
>
> MR. SHEPPARD: Right.
>
> THE COURT: Okay?
>
> MR. SHEPPARD: Okay.
>
> MS. EVANS: The issue? I'm sorry.
>
> THE COURT: Of who bears the cost of the transcription.
>
> . . .
>
> MR. SHEPPARD: Can I get a time frame for when we're supposed to have our letter briefs in on the issue of bearing the cost of transcription?
>
> . . .
>
> THE COURT: And when I get all the briefs, then we'll have a phone conference and I'll make a decision.

Tr. 55, 59, 61.[1] This state of affairs was left unresolved, as demonstrated by plaintiff's January 21 letter, in which he

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[1]The official calendar filed with the Clerk, sometimes referred to as the "day sheet," also notes the pendency of this issue.

states, "I cannot intelligently respond to Your Honor's request for briefing on the issue of which party bears the cost of transcription. . . . I am left with no conception as to how to address the issue left open." Letter of 1/21/92 at 2.

As to the first issue raised--who should administer the oath at depositions--this court finds Fed. R. Civ. P. 28 dispositive:

> **(c) Disqualification for Interest.** No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

While Rule 28(c) is subject to waiver, the magistrate judge correctly concluded that defendant had not waived his objection. However, the question of who *should* administer oaths--specifically, whether defense counsel would be permitted to do so--was never resolved. As the January 16 transcript reveals, resolution of this question (while discussed briefly) was

deferred to a later conference which apparently has never taken place. *See* Tr. 34-35. As above, this matter is not ripe for appeal.

Plaintiff's second objection of the four raised here--that he should be allowed to operate the tape recorders used at depositions--is likewise unavailing. As plaintiff himself concedes, the terms of Rule 28(c) are equally applicable to this issue. While he cites cases holding that the policy informing the Rule--to assure impartiality in the creation of the record of the deposition--is inapplicable where tape recorders are used, rather than stenographers or court reporters, *see, e.g., Marlboro Products Corp. v. North American Philips Corp.*, 55 F.R.D. 487, 489 (S.D.N.Y. 1972), plaintiff fails to make the crucial distinction that those cases universally involve situations in which the attorney permitted to operate the device was not also

a party. While plaintiff's proposed plan allowing him to operate the machines would require him to perform such subsidiary tasks as identifying speakers, a reading of the January 16 transcript strongly suggests that this approach would be unworkable. Not only have the proceedings in this case been marked by acrimony, but plaintiff has also conducted himself at times in a volatile manner, to say the least:

> THE COURT: Please don't get excited Mr. Sheppard. It'll be a lot easier--
>
> MR. SHEPPARD: I am very excited what does this mean--
>
> MS. EVANS: Mr. Sheppard--
>
> MR. SHEPPARD:--if she thinks that someone--
>
> MS. EVANS: Mr. Sheppard, I have--
>
> MR. SHEPPARD: That's absurd.
>
> THE COURT: Mr. Sheppard, this is one of the reasons why I have a problem with you doing everything all by yourself because you're just completely losing it. Please.
>
> MR. SHEPPARD: No, no.

THE COURT: Please.

MR. SHEPPARD: Okay, okay.

THE COURT: We're having a conference in a Court of law and you know that.

. . .

THE COURT: We're not talking about sanctions [against defense counsel].

MR. SHEPPARD: I am talking about sanctions.

THE COURT: Well, I'm not talking about sanctions.

MR. SHEPPARD: Well, I think we--

THE COURT: Mr. Sheppard--

MR. SHEPPARD: We are building into the this [sic] more ways of drawing it out. She says I can talk to her. She still has not returned my phone call.

MS. EVANS: Mr. Sheppard, I think that you're--

THE COURT: Mr. Sheppard, you're proving Ms. Evans' point. Please calm down.

MR. SHEPPARD: No.

THE COURT: Please calm down. What's going to happen in the middle of a deposition when you get very excited and something goes wrong with the machine? I want, I think there has got to be somebody else to run that machine. I will not permit the depositions to go forward with you running the machine.

Tr. 44, 47. In light of this illuminating record, and in light of the "clearly erroneous" standard applicable to this appeal, see 28 U.S.C. § 636(b)(1)(A), this court will not reverse the prudent decision of the magistrate judge.

Finally, plaintiff objects to the decision that defendant be notified of the identity of the third-party individuals selected by plaintiff to operate the recording devices. It is clear to this court that the magistrate judge's order merely preserves the defendant's ability to make advance objections under Rule 28(c) or other such provisions of the Rules or applicable statutes. It is equally clear that the magistrate judge promised to resolve any disputes that might emerge concerning the propriety of that person's service. *See* Tr. 45. Under these circumstances, there is no principled basis for vacating the order of the magistrate judge.

III. *Plaintiff's Motion to Vacate the Referral*

Plaintiff also moves this court for an order withdrawing its earlier referral of pre-trial matters to the magistrate judge. Plaintiff contends that the magistrate judge has deliberately ignored the rules and case law governing the matters before her to plaintiff's detriment, and that she continues to engage in a course of conduct whose purpose is to deprive plaintiff of his ultimate day in court by making it "as drawn-out and expensive as possible for plaintiff to prosecute the case." Pl. Memo of Law at 5.

It is clear that a district court possesses the authority to withdraw a reference of pre-trial matters to a magistrate judge. Although neither Fed. R. Civ. P. 72 nor 28 U.S.C. § 636 addresses this

question,[5] a leading commentator sensibly observes that the district court retains the power to vacate its own orders, and consequently to withdraw all or part of a referral order. See 7 J. Moore, Moore's Federal Practice ¶¶ 72.02[4.-4], 72.02[4.-10], 72.03[7.-4]. It appears that the decision rests entirely in the discretion of the district court. *Id.* In particular, under Rule 4(b) and (c) of the Standing Orders of the Eastern District on Effective Discovery in Civil Cases, a district court may enlarge or diminish the scope of a pre-trial referral order as it relates to discovery matters.

In this case, plaintiff objects to the

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[5]It is true that both Fed. R. Civ. P. 73(b) and § 636(c)(6) permit withdrawal of a referral order in a civil case only on the basis of good cause (if by motion of the court) or extraordinary circumstances (on application of a party). Those two provisions, however, relate solely to referrals for trial on the merits upon consent of the parties.

magistrate judge's "procedural masterplan" requiring orderly resolution of discovery disputes and other disagreements. He contends that this prejudicial treatment, as well as the magistrate judge's frequent, but unspecified, disregard for applicable law, effectively deprives him of the ability to seek legal redress for his injuries. In this respect, the core of plaintiff's assertion is that as an unemployed *pro se* litigant (albeit one with a law degree) he cannot endure the lengthy procedural complications of a case such as this one.

Even a brief examination of the January 16 conference transcript, *see, e.g.*, Tr. 26-33, 42-47, indicates that the magistrate judge in this case has been called upon to show superhuman patience in the face of plaintiff's intransigence. To the extent that plaintiff disagrees with the magistrate judge's rulings, he is free to appeal them to

this court, and has done so.[6] At this juncture, there is no reasoned basis for a finding that the magistrate judge has proceeded improperly, or that this court is more capable of resolving the acrimonious pre-trial disputes between the parties.

CONCLUSION

For the foregoing reasons, defendant's motion for judgment on the pleadings is granted in its entirety. This § 1983 action must be dismissed because plaintiff cannot state a cognizable claim for a First or Fourth Amendment violation under any set of facts as a matter of law. Accordingly, this Court declines to exercise supplemental jurisdiction over plaintiff's pendent state law tort claims under 28 U.S.C. § 1367(c)(3) and *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). Plaintiff's appeal from

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[6]For example, plaintiff has appealed one of the January 16 rulings regarding the conduct of depositions. That appeal is addressed herein.

the magistrate judge's rulings is denied, and his motion to vacate the prior referral order is also denied.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

==========

BRIAN SHEPPARD,

Plaintiff,

-against-

LEON BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,

Defendant.

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CV-91-1349

COMPLAINT AND JURY TRIAL DEMAND

April 16, 1991

A. INTRODUCTORY STATEMENT

1. This is a civil action for money damages and declaratory and injunctive relief arising from defendant's (a) retaliation for plaintiff's protesting, and considering to expose, judicial misconduct, and (b) obstruction of his attempts to air the misconduct and vindicate his rights and those

of persons prejudiced by it.

B. JURISDICTION

2. The Court has jurisdiction pursuant to Title 28, sections 1331, 1343, 1367, 2201, and 2202, as well as Title 42, section 1983, of the United States Code.

C. THE PARTIES

3. Plaintiff is an attorney admitted to practice in New York and this Court. He worked as defendant's law clerk from October of 1986 until December of 1990. He was a resident of Nassau County and a citizen of the United States during that period, and continues to be so today.

4. Defendant was a justice of the Supreme Court of the State of New York for the County of Queens, and a resident of Queens County, in October of 1986, and has continued those statuses to this day. He is being sued in both his individual and official capacities, except that monetary damages are sought from him only in his

individual capacity.

5. At all times mentioned in this complaint, defendant was acting under color of state law--that is, under color of the Constitution, statutes, laws, rules, regulations, customs, and usages of the State of New York, the New York State Unified Court System, and its various subdivisions.

D. PLAINTIFF'S TENURE AS DEFENDANT'S LAW CLERK PRIOR TO DECEMBER OF 1990

6. Throughout plaintiff's tenure as defendant's law clerk, defendant expressed strong approval of plaintiff's work. Plaintiff was also held in high regard by the other court employees and the Queens legal community.

7. During his tenure, plaintiff was exposed to many instances of judicial conduct clearly and strongly proscribed by the codes and rules applicable to the New York judiciary. He attempted, with only partial success, to dissuade defendant from engaging

in such misconduct.

E. THE ARGUMENT BETWEEN THE PARTIES ON DECEMBER 7, 1990

8. Among the cases on defendant's trial calendar during the first week of December of 1990 were *People v. Howard "Pappy" Mason & Chris "Jughead" Williams* and *People v. Steven Babarcich*.

9. *Babarcich* was a vehicular manslaughter case which defendant arranged to have assigned to him, in order to be able to take revenge against Babarcich for being arrested on the manslaughter charge during the stay of sentences he had previously imposed on Babarcich. He frequently told plaintiff that he intended to do everything he could to ensure Babarcich's conviction on the new case. He followed through on that assurance, and the trial began the first week of December.

10. *Mason/Williams* was a murder case in relation to which there were ex parte

communications. On December 6, defendant directed plaintiff to draft a decision denying Williams's pending speedy trial motion without a hearing, regardless of the motion's merits, so that Williams would stand trial, and at a time advantageous to the prosecution.

11. The following morning, December 7, plaintiff refused to follow defendant's direction, saying that he would not take part in the "railroading" of Williams. Defendant responded that although plaintiff was not being discharged, he should seek other employment if he felt that way.

12. Plaintiff declined, saying that *he* was not the one who had acted improperly. Defendant denied any impropriety, until plaintiff reminded him of his misconduct in *Babarcich* and other cases and disclosed plaintiff's having taken notes of courthouse events.

13. Defendant expressed concern as to

whether and when plaintiff would make his notes public. He responded that he was not certain, but that he would no longer have a duty of loyalty to defendant if defendant continued to pressure him into taking part in misconduct.

14. While neither party became physically threatening or lost control of himself, voices were raised and epithets exchanged. Defendant called plaintiff "disturbed" and "disloyal," while plaintiff said that defendant was "corrupt" and a "son-of-a-bitch."

15. Plaintiff immediately apologized for the latter characterization, after which defendant said nothing about it. But defendant's adamant protestations, that his intermittent wrongdoing did not render him "corrupt," failed to persuade plaintiff.

16. The argument ended with no resolution. Plaintiff worked the remainder of the day without incident. After the

intervening weekend and his illness on December 10, he returned to work on the 11th.

F. PLAINTIFF'S DISCHARGE AND PHYSICAL REMOVAL, AND THE SEARCHES AND SEIZURES OF HIS PROPERTY.

17. Plaintiff's information, obtained from judges, clerks, law clerks, other court personnel, members of the media, and other sources, causes him to believe the allegations contained in paragraphs 18 through 20, 23, and 30 through 33, below. He needs discovery to obtain knowledge of the truth or falsity of these allegations, knowledge which defendant possesses as to virtually all of them.

18. Prior to plaintiff's return on December 11, defendant embarked on a course of conduct, set forth below, designed to: (a) examine or seize plaintiff's notes on courthouse events and other material in his office relating to judicial misconduct, including what he might bring to work on the 11th; (b) punish him for his objecting to, or

considering to expose, such misconduct; and/or (c) impede his ability to air the misconduct or vindicate his own rights or those of persons prejudiced by it, by [1] discrediting or intimidating him, [2] discouraging others from assisting him, and/or [3] restricting his access to information in the courthouse.

19. Before plaintiff's return on the 11th, defendant searched, or caused to be searched, plaintiff's private office in defendant's chambers. Although the notes sought were not found, something was discovered which caused defendant to fear that plaintiff intended to report on judicial misconduct on December 12.

20. On or shortly before the 11th, defendant made statements regarding plaintiff to the administrative judge and the chief clerk of the Supreme Court for Queens County. Pursuant to defendant's request, they directed that court officers take the actions

against plaintiff described in paragraphs 22 and 23, below.

21. Defendant knew that plaintiff had done nothing to warrant the taking of such actions.

22. Plaintiff returned to work on the 11th at 9:15 AM. At 11:10 AM, by which time defendant had not yet appeared in his courtroom or chambers, a principal court officer (a) entered the chambers accompanied by two other court officers; (b) advised plaintiff that defendant had discharged him effective the end of the previous day, December 10; and (c) directed plaintiff [1] to immediately leave the courthouse in the company of the other officers, without first being allowed to gather his belongings from his office, and [2] not to return for his property except in the company of the officers at a later time. Plaintiff was then escorted out of the courthouse by the two officers.

23. Other court officers guarding the entrances to the courthouse were directed to prevent plaintiff's reentry.

24. After plaintiff's removal, defendant again searched, or caused to be searched, his office, including the file cabinets and desk drawers. A box of his personal file cards was seized and removed to defendant's private office and examined. Almost all of his remaining belongings were placed in a box and put aside.

25. When plaintiff returned to his office on December 13 in the company of court officers, he protested the seizure of his file cards. A court employee retrieved them for him from defendant's office.

26. Plaintiff attempted to remove personal files from his file cabinet, but was prevented from doing so by a different court employee, acting at defendant's direction. The employee advised him that defendant would determine at a later time whether he could

take the files.

27. After defendant examined, or caused to be examined, those files, plaintiff was advised on December 17 that he could have them.

28. Although files were returned to plaintiff on December 21, he is unable to ascertain, without discovery, whether defendant has retained some of his files or other of his property.

29. It is neither the policy nor custom of defendant or other New York judges (a) to search their law clerk's office or seize any objects therefrom, except to the extent that materials belonging to the court or the judge, located in plain view or in file cabinets, might be briefly sought and removed as needed for legitimate court purposes; or (b) when firing a law clerk, to physically remove him from the courthouse or deny him the opportunity to gather his belongings before others intrude upon his office and

property therein.

G. DEFENDANT'S FALSE STATEMENTS ABOUT PLAINTIFF

30. Beginning on or shortly after December 7, defendant made false and defamatory statements to others, that the reasons for plaintiff's abrupt discharge and physical removal were his having called defendant a "son-of-a-bitch" and having completely lost control of himself. These statements, which did not mention defendant's misconduct, were thereafter repeated by those who heard them to other persons.

31. Without discovery, plaintiff cannot specify the exact words, dates, locations, or parties involved in defendant's false statements and their repetitions. Plaintiff's information does indicate, at the very least, that such statements were (a) made by defendant to judges, clerks, law clerks, and other court employees, in the Queens courthouses on or about December 11

and at a Brandeis Association gathering on or about December 12, and then (b) circulated among other court personnel.

32. As a result of the actions taken against plaintiff on December 11 at defendant's request, as well as defendant's false statements, false and defamatory rumors spread in and around the Queens courthouses about the reasons for plaintiff's abrupt discharge and physical removal, including that he had been arrested, had assaulted defendant, and was otherwise a criminal.

33. Defendant has continued since December of 1990 to make false statements about plaintiff's discharge and removal, and intends to do so in the future.

H. DEFENDANT'S INTERFERENCE WITH PLAINTIFF'S COURTHOUSE ACTIVITIES IN 1991

34. On January 18, 1991, defendant directed that if plaintiff wished to examine court files in cases pending before defendant, he would have to do so outside the

courtroom. This caused him to miss part of defendant's calendar call on that day. He had never heard of defendant's making such a direction before.

35. On January 28, defendant told the attorney for Babarcich (whose December, 1990, trial had since been aborted) on the record that it would be improper for the attorney to speak to plaintiff about anything he learned as defendant's law clerk. The attorney has since refused to speak to him, citing defendant's admonition.

36. On January 30, while plaintiff was in defendant's courtroom waiting for the *Williams* case (which had since been severed from *Mason*) to be called, defendant suspended his calendar call to field questions from persons in the audience. He gratuitously stated that those in the audience who were not parties to cases "should not be involved" in them.

37. On February 11, plaintiff went in and

out of defendant's courtroom during the calendar call, looking for Williams's attorney. Defendant stated on the record that plaintiff was using the courtroom like a "revolving door." He attempted to respond, but defendant told him to sit down and not speak. He had often seen attorneys come in and out of defendant's courtroom while proceedings were taking place, but none of them was subjected to the rude treatment he received. He has not returned to defendant's courtroom since that day.

I. CAUSES OF ACTION

38. Defendant's acts detailed above have violated and/or threaten to violate the following rights of plaintiff as guaranteed by the United States Constitution, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, and made actionable under Title 42, section 1983 of the United States Code: (a) the First Amendment rights [1] of freedom of speech,

[2] to petition for redress of grievances, and [3] of access to criminal proceedings and documents; and (b) the Fourth Amendment right to be free from unreasonable searches and seizures.

39. Defendant's acts have also deprived, and/or threaten to deprive, plaintiff of his right to be free from the following torts under New York law and subject to this Court's pendent jurisdiction: false imprisonment, trespass, conversion, defamation, intentional infliction of emotional distress, prima facie tort, false words causing special damages, interference with prospective contractual relations, and wrongful termination of an attorney court employee on grounds violating public policy.

J. SPECIAL DAMAGES

40. As a result of defendant's acts, plaintiff has sustained, and anticipates sustaining in the future, the following special damages not otherwise previously

mentioned: mental anguish; personal and public humiliation; damage to reputation, career, and employment opportunities; loss of income and all benefits derived from employment with the court system; fear, and resultant avoidance, of entering the Queens courthouses, particularly defendant's courtroom; fear that items may have been seized during the searches of his office and not returned to him; and fear that defendant will further retaliate against him for his instituting this action, exposing judicial misconduct, and otherwise exercising his First Amendment rights.

K. JURY TRIAL DEMAND

41. Plaintiff demands a jury trial on all issues in this action to the extent allowable by law.

L. PRAYER FOR RELIEF

WHEREFORE, plaintiff requests judgment against defendant, as follows:

1. A declaration that defendant

discharged plaintiff and had him physically removed from the courthouse, not for the pretextual reasons defendant has proffered, but rather for his protesting, and considering to air, judicial misconduct.

2. An order permanently enjoining defendant, and all those acting in concert with him, from (a) stating that the reason for plaintiff's discharge or removal was anything other than his objecting to, and contemplating the exposure of, judicial misconduct; (b) interfering with the efforts of plaintiff, or anyone who wishes to assist him, in exposing such misconduct or vindicating the rights of those prejudiced by it; and (c) otherwise retaliating against plaintiff for his having exercised, or his exercising, his First Amendment rights in relation to this action or the issues involved therein.

3. Monetary relief against defendant in the form of (a) compensatory damages in

the amount of $500,000; (b) punitive damages in the amount of $500,000; and (c) attorney's fees, costs, disbursements, and interest.

4. For such other relief that this Court deems proper.

BRIAN SHEPPARD, Plaintiff

by _____
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Attorney for Plaintiff

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Dated: April 16, 1991

No. 93-1943

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BRIAN SHEPPARD,

Petitioner,

—against—

LEON BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent Leon Beerman, a Justice of the Supreme Court of the State of New York ("respondent Justice"), respectfully submits this brief in opposition to the petition for a writ of certiorari. The petition should be denied because, as an initial matter, petitioner seeks review of an interlocutory order. Moreover, the petition does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court.

STATEMENT OF THE CASE

Petitioner commenced this civil rights action pursuant to 42 U.S.C. § 1983 on April 16, 1991, against respondent Justice,

alleging that respondent Justice violated his First and Fourth Amendment rights in discharging him from employment as respondent's law clerk. Petitioner, an attorney licensed to practice law in the State of New York, was hired in October, 1986 by respondent Justice to serve as his law clerk. (68-a, ¶ 22).[1] He was fired on December 10, 1990, after a serious argument with respondent on December 7, 1990. (75-a, ¶ 22).

According to the complaint, on December 6, 1990, respondent Justice directed petitioner to draft a decision denying a criminal defendant's pending speedy trial motion. (71-a, ¶ 11). Petitioner admits that the next morning he adamantly refused to follow respondent's directive that he draft the decision. (*Id.*) A discussion between petitioner and respondent Justice ensued, which quickly escalated into a heated argument. During the course of the argument, petitioner admits that he called respondent Justice "corrupt" and a "son-of-a-bitch," and asserts that respondent referred to him as "disturbed" and "disloyal." (72-a, ¶ 14). The complaint asserts that the argument ended without resolution, and that petitioner worked the remainder of the day. (72-a - 73-a, ¶ 16).

When petitioner returned to work on December 11, 1990, he was advised by court officers that he had been fired effective December 10, 1990. (75-a, ¶ 22). The complaint further alleges that the court officers directed plaintiff to immediately leave the courthouse, that he was not allowed to collect his belongings from his office, and that he was directed not to return for his property except in the company of officers at a later time. (*Id.*) Petitioner alleges that he was then escorted out of the courthouse by two court officers. (*Id.*)

Petitioner also claims that both just before and after he was fired his office was searched by respondent Justice or by others at the respondent's direction. (74-a - 76-a, ¶¶ 19, 24). Further, he claims that a box containing his personal file cards was seized and removed to respondent's office and examined,

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[1] References to the Petition and the Appendix to the Petition are cited as "__" and "__-a," respectively.

and that his remaining belongings were placed in a box and put aside. (76-a, ¶ 24). Petitioner admits, however, that just two days after his discharge, on December 13, 1990, he was permitted to enter respondent Justice's chambers and retrieve his personal belongings, including the file cards. (76-a, ¶ 25). Petitioner alleges that on that day, he attempted to remove personal files from his file cabinet and was prevented from doing so, but concedes that on December 17, 1990, he was told he could have the files and on December 21, 1990 they were returned. (76a - 77-a, ¶¶ 26-28).

In addition, the complaint alleges that respondent interfered with petitioner's courthouse activities. (79-a - 80-a, ¶ 34). He claims that on January 18, 1991, when he attended the calendar call in respondent's courtroom, the Judge directed that if he wished to examine court files he would have to do so outside the courtroom, causing petitioner to miss part of the calendar call. (*Id.*) Additionally, petitioner alleges that on February 11, 1991, he was told by respondent not to keep coming in and out of the courtroom during the calendar call, and that when petitioner attempted to respond the Judge told him to sit down and be quiet. (80-a - 81-a, ¶ 37).

Pursuant to 42 U.S.C. § 1983, petitioner asserts that respondent's actions violated his First Amendment rights to freedom of speech, to petition for redress of grievances and to access to the court, as well as his Fourth Amendment right to be free from unreasonable searches and seizures. (81-a - 82-a, ¶ 38).

Respondent moved for judgment on the pleadings on or about February 6, 1992, on the grounds that petitioner had not met threshold pleading requirements, that the complaint failed to state a cause of action, and that respondent Justice was entitled to qualified immunity.

A. Decision of the District Court

By memorandum and order dated May 21, 1993, the United States District Court for the Eastern District of New York (*Glasser*, J.) granted respondent's motion for judgment on the

pleadings on the ground that petitioner could not state a cognizable constitutional claim under any set of facts as a matter of law. (31-a - 47-a).

The district court held that as a matter of law petitioner's speech did not pertain to a matter of public concern, and thus his discharge did not implicate the First Amendment. (40-a - 47-a). The court held that petitioner's other First Amendment claims must also be dismissed as non-cognizable. (45-a - 47-a).

With respect to petitioner's Fourth Amendment claims, the district court held that as a matter of law petitioner had failed to state a cause of action upon which relief could be granted. (52-a). The one week delay in retrieving his property from the judge's chambers did not amount to an unlawful seizure, (49-a), because it was objectively reasonable for the respondent to safeguard court files by requiring petitioner to return later, in the company of court officers, in order to prevent petitioner from removing or destroying documents in retaliation for being fired. (48-a - 49-a). The court also held that petitioner's person had not been seized when he was escorted out of the respondent Justice's chambers on December 11, 1990, or when he was told to sit down and be quiet after repeatedly entering and exiting respondent's courtroom on February 11, 1991. (52-a, n. 3). In neither instance, the court ruled, was petitioner's liberty restrained. He was free to go anywhere else but the courthouse on December 11, 1990, and was free to remain in or leave the courtroom on February 11, 1991. (*Id.*)

The court also rejected petitioner's claim that his property was unlawfully searched. The court reasoned that, given the unique working relationship between judge and clerk, the myriad documents pertaining to judicial matters in a judge's chambers are per force subject to the control of the judge. (52-a). In light of the nature of the particular work environment, petitioner had no reasonable expectation of privacy in the furnishings or appurtenances of the judge's chambers and other work areas. (*Id.*) Absent such reasonable expectation of

privacy, the court held that the Fourth Amendment was not implicated. (51-a - 52-a).

B. Decision of the Court of Appeals

The court of appeals affirmed the district court's decision in part and vacated and remanded the decision in part. (20-a - 21-a). The court affirmed the District Court's finding that respondent's conduct did not implicate the Fourth Amendment. (15-a - 20-a). Specifically, the court confirmed the district court's conclusion that petitioner "had no reasonable expectation of privacy in his office furniture or file cabinets, and therefore any search was not violative of [petitioner's] Fourth Amendment rights." (16-a). A basis for the court's holding that the district court was correct was the "distinctive open access to documents characteristic of judicial chambers." (17-a).

The court also agreed with the district court's finding "that any alleged seizure done in connection with the search was similarly not violative of [petitioner's] Fourth Amendment rights." (18-a). The court stated that, "[e]ven assuming that [petitioner's] belongings were seized for a short time during the judges' search of his things, a short delay by a judicial employer in returning a disgruntled employee's belongings after the employee has been fired does not rise to the level of a Fourth Amendment violation." (18-a).

The court of appeals also affirmed the district court's dismissal of petitioner's claim of unlawful seizure of his person when he was escorted out of the courthouse by court officers on December 11, 1990, (19-a), holding that petitioner's liberty was never restrained because petitioner was "free to go anywhere else that he desired, with the exception of [respondent's] chambers and the courthouse." (20-a).

As to petitioner's First Amendment claims, the court of appeals held "that in concluding the [petitioner] failed to state a violation of his First Amendment right to free speech, the district court made certain factual determinations that were

not appropriate on a motion for judgment on the pleadings." (20-a - 21-a). Consequently, the court vacated the district court's dismissal of petitioner's First Amendment claims on the pleadings and remanded "for proceedings not inconsistent with this opinion." (21-a). The court made clear that "[i]n doing so. . .we make no comment on the merits of the claim nor do we preclude the district court from re-examining the matter at some future, more appropriate time in the proceedings." (21-a).[2]

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because petitioner seeks review of an interlocutory order, that part of the court of appeals' order affirming the district court's dismissal of all of petitioner's Fourth Amendment claims. In addition, even assuming the Court determines to review the interlocutory judgment, it should deny the writ of certiorari because the petition does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court.

This Court has long recognized that federal law expresses a policy against piecemeal appeals. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 178 (1955). While this Court clearly has jurisdiction to review interlocutory judgments, such as that presented here, "the interlocutory nature of a federal court of appeals judgment is relevant to the Court's discretionary assessment of the appropriateness of immediately reviewing such a judgment." Stern, Gressman & Shapiro, *Supreme Court Practice*, (6th ed. 1986), at p. 224.

According to this Court in *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893), the Court "should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory

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[2] Petitioner has requested that the district court hold the matter in abeyance pending disposition of the instant petition.

order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." Certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *** And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Accordingly, the lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for the denial of the application." *Id. See also, Brotherhood of Locomotive Firemen and Engineermen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) (certiorari review denied "because the court of appeals remanded the case [and therefore it] is not yet ripe for review by this Court"); *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (referring to "the Court's normal practice of denying interlocutory review" (*Stevens, J., dissenting*)). *See also* Stern, Gressman & Shapiro, *Supreme Court Practice*, at p. 224.

In the instant case, the decision of the court of appeals is clearly interlocutory in nature. As noted above, the court of appeals affirmed so much of the district court's order dismissing the Fourth Amendment claims, but vacated and remanded as to petitioner's First Amendment claims. Petitioner cannot demonstrate that this Court's immediate review of the instant issue presented, namely, the Fourth Amendment claim, is in any way "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction, et al. v. Jacksonville, et al.*, 148 U.S. at 384. Neither can petitioner show that the question presented is at all "of peculiar gravity and general importance." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. at 258.

Indeed, as demonstrated by petitioner's phrasing of his Questions Presented, Nos. 2 and 3, (i), petitioner himself posits the Fourth Amendment issue as being inextricably interwoven with the First Amendment issues which were remanded to the district court. Specifically, petitioner's ref-

erences to "retaliatory discharge" and to his purported "discharge. . .for objecting to the misconduct of the judge" are clearly references to the First Amendment issues remanded to the district court.

Moreover, petitioner will not be prejudiced if the petition is denied. It is well-settled that this Court has the power to reach back to all interlocutory proceedings and address any alleged prior judicial errors in the context of a subsequent certiorari petition from the final judgment, assuming the questions are properly preserved in the lower courts after the initial denial. *Mercer v. Theriot*, 377 U.S. 152 (1964); *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Hamilton-Brown Shoe Co.*, 240 U.S. 251, 258 (1916). A prior denial of a petition for a writ of certiorari by the Court on an interlocutory appeal does not constitute *res judicata* on the issue for future appellate review. *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. For these reasons the Court should adhere to its "normal practice of denying interlocutory review," and deny certiorari review here.

In any event, as noted above, the petition does not meet this Court's criteria for certiorari review because it does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court. Indeed, petitioner does not even allege that a conflict exists among the courts of appeals on the Fourth Amendment issue presented.

In rejecting petitioner's Fourth Amendment claims both the district court and the court of appeals simply applied well-established principles. Whether a search implicates the warrant requirement of the Fourth Amendment depends on whether society objectively recognizes a privacy interest in the area to be searched. *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). As the Court stated in *O'Connor*: "[p]ublic employees' expectations of privacy in their offices may be reduced by virtue of actual office practices. . .[and] some government offices may be so open to fellow employees or the public that

no expectation of privacy is reasonable. . .Given the great variety of work environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Id.* at 717-18.

Here, the courts below correctly held that, given the unique working relationship between judge and law clerk, the myriad documents and records pertaining to judicial matters in a judge's chambers are perforce subject to the control of the judge. (51-a - 52-a). In light of the nature of the particular work environment, plaintiff had no reasonable expectation of privacy in the furnishings or appurtenances of the judge's chambers and other work areas. (*Id.*) Absent such reasonable expectation of privacy, the Fourth Amendment was not implicated. (*Id.*)

Similarly, it was objectively reasonable for the respondent Justice to safeguard court files by requiring petitioner to return later in the company of court officers in order to prevent petitioner from removing or destroying documentation in retaliation for being fired (48-a - 49-a), and to have petitioner escorted out of the respondent's chambers on December 11, 1990. In neither instance was petitioner's liberty restrained. Accordingly, there is no conflict or important federal question which merits this court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 29, 1994

Respectfully submitted,

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